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County of Sacramento and Sacramento  
13 County Water Agency

**EXEMPT FROM FILING FEES  
PURSUANT TO GOV. CODE, § 6103**

14 SUPERIOR COURT OF CALIFORNIA

15 COUNTY OF SACRAMENTO

16 COUNTY OF SACRAMENTO, a California  
17 county, and SACRAMENTO COUNTY  
WATER AGENCY, a California water district,

18 Petitioners and Plaintiffs,

19 v.

20 CALIFORNIA DEPARTMENT OF WATER  
21 RESOURCES, a California state agency,

22 Respondent and Defendant,

23 DOES 1 through 50,

24 Real Parties in Interest,

25 AND RELATED ACTIONS.  
26  
27  
28

**Case No. 24WM000014**

(Related to 24WM000006; 24WM000008;  
24WM000009; 24WM000010; 24WM000011;  
24WM000012; 24WM000017; 24WM000062)

**Assigned to Hon. Stephen P. Acquisto  
Department 36**

CALIFORNIA ENVIRONMENTAL  
QUALITY ACT (CEQA) CASE

**DECLARATION OF LOUIDA V. LACEY  
IN SUPPORT OF COUNTY OF  
SACRAMENTO AND SACRAMENTO  
COUNTY WATER AGENCY'S MOTION  
FOR PRELIMINARY INJUNCTION**

**DATE: May 31, 2024  
TIME: 1:30 p.m.  
DEPT: 36**

Petition Filed: January 22, 2024  
Amended Petition Filed: February 16, 2024

1 I, Louinda V. Lacey, declare:

2 1. I am an attorney at law licensed to practice before the courts of the state of  
3 California. I am of counsel with Somach Simmons & Dunn and counsel of record for Petitioners  
4 and Plaintiffs County of Sacramento and Sacramento County Water Agency (Petitioners). The  
5 following matters are within my personal knowledge and, if called as a witness, I can competently  
6 testify thereto. This declaration is made in support of Petitioners' Motion for Preliminary  
7 Injunction (Motion).

8 2. On May 5, 2024, I downloaded the Notice of Determination issued by the Director  
9 of the California Department of Water Resources (DWR) on December 21, 2023, for the Delta  
10 Conveyance Project (DCP) Final Environmental Impact Report (FEIR), from DWR's website at  
11 <https://cadwr.app.box.com/s/xwscz3s54vbiwfljzohkcg6dl5902gk>. A true and correct copy of this  
12 document is attached to Petitioners' Request for Judicial Notice in support of the Motion filed  
13 concurrently herewith (RJN) as Exhibit A.

14 3. On May 5, 2024, I downloaded DWR's "Decisions" document pertaining to its  
15 Certification of the DCP FEIR, Adoption of Findings and Statement of Overriding  
16 Considerations, Mitigation, Monitoring and Reporting Program and Execution of a Notice of  
17 Determination, which was signed by the Director of DWR on December 21, 2023, from DWR's  
18 website at <https://cadwr.app.box.com/s/g2ibx7wo7hjncdpzu1fcl1i0yqrwcnxi>. A true and correct  
19 copy of the document is attached to the RJN as Exhibit B.

20 4. On May 5, 2024, I downloaded pages 3-1, 3-2, and 3-116 through 3-141 in  
21 Chapter 3 of the DCP FEIR from DWR's website at  
22 <https://cadwr.app.box.com/s/xbs1lry77n07u2cm60a8ledfvk31i3ra>. True and correct copies of the  
23 foregoing pages are attached to the RJN as Exhibit C.

24 5. On May 5, 2024, I downloaded a map book to Chapter 3 of the DCP FEIR, titled  
25 "**Figure: Index Bethany Reservoir Alignment Alternative 5,**" from DWR's website at  
26 <https://cadwr.app.box.com/s/a7dp9bj7xcn3wnjx8exjsds6llrq6ny/file/1369521647499>. A true  
27 and correct copy is attached to the RJN as Exhibit D.

1           6.       On May 5, 2024, I downloaded Common Response 8 “Relationship to Other  
2 Plans, Projects, Policies, and Programs” located in Chapter 3 of Volume 2 of the DCP FEIR from  
3 DWR’s website at <https://cadwr.app.box.com/s/78ox5m81b03cywtjtz3zvw459oalom5n7>. A true  
4 and correct copy is attached to the RJN as Exhibit E.

5           7.       The County of Sacramento filed a Petition for Writ of Mandate and Complaint  
6 challenging DWR’s approval of the DCP and certification of the DCP FEIR in Sacramento  
7 Superior Court Case No. 24WM000014 on January 22, 2024. Petitioners thereafter filed a First  
8 Amended Petition for Writ of Mandate and Complaint (Petition). A true and correct copy of the  
9 Petition, without the attachments thereto, is attached hereto as Exhibit 1.

10          8.       A true and correct copy of Attachment B to the Petition, County of Sacramento’s  
11 comment letter to the DCP draft environmental impact report (DCP DEIR), without the additional  
12 attachments thereto, is attached hereto as Exhibit 2.

13          9.       A true and correct copy of Attachment F to the Petition, Sacramento County Water  
14 Agency’s comment letter to the DCP DEIR, without the additional attachments thereto, is  
15 attached hereto as Exhibit 3.

16          10.       During the Case Management Conference in this case on February 16, 2024, I  
17 raised, on behalf of Petitioners and other clients, concerns regarding rumors that DWR was  
18 planning to undertake geotechnical activities under the DCP FEIR sometime over the summer.  
19 The trial court confirmed that motions for injunctive relief could be filed and heard prior to the  
20 next Case Management Conference on May 31, 2024.

21          11.       On April 3, 2024, I participated in a meeting with DWR’s counsel to discuss the  
22 geotechnical activities that DWR intended to undertake starting on May 1, 2024. Counsel for  
23 other petitioners in some of the related cases also participated in that meeting. Approximately 1.5  
24 hours prior to the meeting, I received a document titled “2024 Preconstruction Field  
25 Investigations – Environmental Compliance, Clearance, and Monitoring Plan” (2024  
26 Preconstruction Plan) from L. Elizabeth Sarine, Deputy Attorney General and counsel for DWR.  
27 A true and correct copy of the 2024 Preconstruction Plan is attached hereto as Exhibit 4.

1           12.     During the foregoing April 3, 2024, meeting, DWR represented that the  
2 geotechnical activities planned for May and June 2024 would be performed under a voluntary  
3 “temporary entry permit” with respective landowners.

4           13.     On April 8, 2024, I prepared a meet and confer letter to L. Elizabeth Sarine,  
5 Deputy Attorney General and counsel for DWR, on behalf of Petitioners and Plaintiffs County of  
6 Sacramento, Sacramento County Water Agency, City of Stockton, and Sacramento Area Sewer  
7 District in this and related actions. My office sent the letter to Ms. Sarine on the same day. A  
8 true and correct copy of the letter is attached hereto as Exhibit 5.

9           14.     On April 12, 2024, I participated in a meet and confer meeting convened by DWR  
10 in response to the foregoing April 8, 2024, letter. I participated in the meeting on behalf of  
11 Petitioners and Plaintiffs County of Sacramento, Sacramento County Water Agency, City of  
12 Stockton, and Sacramento Area Sewer District in this and related actions. Counsel for some of  
13 the other petitioners in the related actions also participated in that meeting.

14           15.     On April 15, 2024, I prepared and sent a letter to L. Elizabeth Sarine, Deputy  
15 Attorney General and counsel for DWR, on behalf of petitioners County of Sacramento and  
16 Sacramento County Water Agency (Case No. 24WM000014), City of Stockton (Case No.  
17 24WM000009), Sacramento Area Sewer District (Case No. 24WM000012), San Francisco  
18 Baykeeper et al. (Case No. 24WM000017), County of Butte (Case No. 24WM000011), South  
19 Delta Water Agency et al. (Case No. 24WM000062), and County of San Joaquin et al. (Case No.  
20 24WM000010) in response to the April 12, 2024 meeting. A true and correct copy of the letter is  
21 attached hereto as Exhibit 6.


22           16.     On April 22, 2024, I received a letter from L. Elizabeth Sarine, Deputy Attorney  
23 General and counsel for DWR, in response to my letters dated April 8, 2024, and April 15, 2024.  
24 A true and correct copy of the letter is attached hereto as Exhibit 7.

25           17.     DWR is aware that Petitioners and others in some of the related cases will be  
26 seeking a preliminary injunction to enjoin the geotechnical activities. To date, DWR has refused  
27 to postpone the geotechnical activities planned for May and June 2024.  
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18. On May 6, 2024, I downloaded “Figure ES-1. Sacramento-San Joaquin Delta” on page 5 of the Executive Summary in the DCP FEIR from DWR’s website at <https://cadwr.app.box.com/s/28dykirctpwkny65amoxg7dxr125rl6p>. A true and correct copy is attached to the RJN as Exhibit F.

I declare under penalty of perjury under the laws of the State of California that the facts recited above are true and correct. Executed this 8th day of May 2024 at Roseville, California.

  
\_\_\_\_\_  
Louinda V. Lacey

# Exhibit 1

**FILED/ENDORSED**  
FEB 16 2024  
By: S. Woltmon  
Deputy Clerk

SOMACH SIMMONS & DUNN  
A Professional Corporation

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Attorneys for Petitioners and Plaintiffs  
County of Sacramento and Sacramento County  
Water Agency

**EXEMPT FROM FILING FEES  
PURSUANT TO GOV. CODE, § 6103**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

COUNTY OF SACRAMENTO, a California  
county, and SACRAMENTO COUNTY WATER  
AGENCY, a California water district,

Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES, a California state agency,

Respondent and Defendant,

DOES 1 through 50,

Real Parties in Interest.

Case No. 24WM000014  
*Assigned to Hon. Stephen P. Acquistio  
Department 36*

**FIRST AMENDED PETITION FOR  
WRIT OF MANDATE AND  
COMPLAINT**

(Code Civ. Proc., §§ 525, 526, 527, 1060,  
1085, 1094.5; Pub. Res. Code, §§ 21168,  
21168.5, 29700 et seq.; Wat. Code §§ 1215  
et seq., 12200 et seq., 11460 et seq., 85000  
et seq.; Public Trust Doctrine)

**CALIFORNIA ENVIRONMENTAL  
QUALITY ACT (CEQA) CASE**

[Deemed Verified As to Public Agency  
Petitioner Pursuant to Code of Civil  
Procedure Section 446]

FILED: January 22, 2024







1 impacts because it will generate hundreds of thousands of heavy truck trips on Interstate 5 and local roads  
2 and will generate substantial noise over a long period of time. The total Delta footprint of the Project  
3 would occupy 1,313.75 acres.

4 4. In addition to permanently scarring the Delta landscape, the Project would divert  
5 up to 6,000 cubic feet per second (cfs) of Sacramento River water at the Town of Hood intakes.  
6 This is more than half of the capacity of the existing SWP Banks pumping plant and more than  
7 the capacity of the federal Central Valley Project Jones pump at Tracy. Under certain conditions,  
8 diversions would remove up to one-third of the Sacramento River water downstream of the  
9 intakes.

10 5. Petitioners bring this action under the California Environmental Quality Act  
11 (CEQA; Pub. Resources Code, § 21000, et seq.) and on other grounds as specified herein to  
12 challenge DWR's certification of the FEIR and approval of the Project. Under CEQA, prior to  
13 making a decision to certify the FEIR and approve the Project, DWR was required to fully  
14 analyze and mitigate the Project's potentially significant impacts and disclose them in a manner  
15 reasonably calculated to inform the public, and meaningfully consider potentially feasible  
16 alternatives to the Project or its location that would be capable of meeting most of the Project's  
17 objectives while eliminating or reducing one or more of its significant impacts. DWR did not  
18 satisfy these requirements. The Project and the FEIR fail to comply with CEQA for the reasons  
19 described below. The Project is also inconsistent with or violates several other state laws, as  
20 discussed herein, and the public trust doctrine.

21 6. Because of the FEIR's numerous flaws, and DWR's procedural errors, DWR  
22 prejudicially abused its discretion, failed to proceed in the manner required by law, and violated  
23 CEQA when it certified the FEIR and approved the Project. Petitioners thus request that this  
24 Court issue a peremptory writ of mandate directing DWR to set aside its approval of the Project  
25 and its certification of the FEIR and its decisions and findings related to the Project. Petitioners  
26 further request an order declaring the Project is inconsistent with or violates the state laws  
27 discussed herein and the public trust doctrine, and an injunctive order preventing DWR from  
28 issuing any further approvals, expenditure of funds, or initiation of any construction related to the

1 Project until DWR has complied with CEQA, the state laws cited herein, and the public trust  
2 doctrine.

3 **PARTIES**

4 7. Petitioner County of Sacramento is a political subdivision of the State of  
5 California and has the authority to sue and be sued. The County is governed by a five-member  
6 Board of Supervisors. The County along with SCWA is the groundwater sustainability agency  
7 (GSA) responsible for local groundwater management in certain areas of the County, including  
8 the South American Subbasin (SASb), and has developed a groundwater sustainability plan  
9 (GSP) for the SASb in conjunction with four other GSAs in the subbasin. The County holds a  
10 seat on the board of the Sacramento Central Groundwater Authority (SCGA), which manages the  
11 majority of the SASb.

12 8. Petitioner Sacramento County Water Agency is a California water agency formed  
13 in 1952 by the Sacramento County Water Agency Act (Agency Act), which is a special  
14 legislative act of the State of California. (See Wat. Code Appen., Chapter 66.) SCWA is  
15 governed by a five-member Board of Directors, and the five members of the County's Board of  
16 Supervisors are the ex officio members of the SCWA Board of Directors. SCWA, under the  
17 Agency Act, is charged in part with making water available for the beneficial use of lands and  
18 inhabitants, and producing, storing, transmitting, and distributing water. SCWA is the water  
19 supplier for the Town of Hood, which relies entirely upon local groundwater supply. SCWA, as  
20 the primary water supplier for the growth areas of the County, plays an important role in the  
21 environmental and economic health of the County. Water supply is closely tied to development,  
22 and SCWA continues to place a high priority on identifying and developing water supplies to  
23 support the region's economic growth. Responsible water management is critical to protecting  
24 environmental resources, including groundwater resources, and complying with state law  
25 requirements for sustainability. The Agency Act authorizes SCWA to create "benefit zones" for  
26 the purpose of funding capital projects, the purchase of water supplies, maintenance activities,  
27 studies, and other activities that benefit those included in the zone. SCWA is empowered to  
28 establish fees, charges, credits, and regulations for the supply of water to zones within SCWA.



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**STANDING**

13. As described herein, Petitioners are beneficially interested in the subject matter of this proceeding because the Project will adversely affect the environmental resources within the County as well as availability of surface and groundwater supplies that SCWA relies on to serve its customers. Each of the Petitioners has a direct and substantial beneficial interest in ensuring that DWR complies with laws relating to environmental protection, and the County and its residents, and SCWA, are substantially adversely affected by DWR’s failure to comply with CEQA and the public trust doctrine.

14. By certifying a FEIR that is not supported by substantial evidence, approving the Project when the Project was not adequately analyzed under CEQA, and otherwise failing to comply with CEQA’s substantive and procedural requirements, DWR has placed the residents and businesses of the County, and the Sacramento River ecosystem and the water resources relied on by SCWA, at a significant risk. The approval of the Project further violates or is inconsistent with other state laws and the public trust doctrine, as discussed herein. Petitioners thus have standing to assert the claims raised in this Petition.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES**

15. As explained herein, Petitioners actively participated throughout the administrative process that led to DWR’s decision to certify the FEIR for the Project. Petitioners participated by submitting comment letters and relevant evidence with regard to the draft EIR (DEIR) and FEIR. The County’s comments to the DEIR and FEIR are attached hereto as Attachments B through E. SCWA’s comments to the DEIR and FEIR, which were also incorporated into the County’s comments, are attached hereto as Attachments F and G. Petitioners have thus objected to Project approval during DWR’s proceedings and may assert issues that were raised by Petitioners and other parties.

16. Petitioners have fully exhausted all administrative remedies in that the determination by DWR is final, and no further administrative appeal procedures are provided by state or local law.



1 affecting the public interest. This action will, among other things, confer a significant benefit on  
2 the general public and a large class of persons, and the necessity and burden of enforcement  
3 against another public entity makes an award of fees appropriate.

4 **INADEQUATE REMEDY AT LAW – STAY AND INJUNCTION**

5 22. In its comment letters to DWR, Petitioners requested that certification of the FEIR  
6 and approval of the Project be deferred until the FEIR’s informational deficiencies were  
7 addressed and resolved, and until adequate mitigation was developed and sufficient alternatives to  
8 the Project were properly considered. DWR refused to take such actions, and instead certified the  
9 FEIR and approved the Project.

10 23. Pursuant to Code of Civil Procedure sections 1085 and 1094.5, the Court may stay  
11 or enjoin the operation of any administrative decision or order involved in this proceeding.

12 24. In light of DWR’s CEQA violations in certifying the FEIR and approving the  
13 Project, any action regarding the construction or operation of the Project will irreparably harm the  
14 environment as described in this Petition, to the detriment of Petitioners and the Delta’s residents,  
15 businesses, and water users.

16 25. Petitioners lack an adequate remedy at law for the irreparable harm that Project  
17 activities will cause. Therefore, a stay or preliminary or permanent injunction should be issued in  
18 this case restraining DWR from taking any additional actions to issue permits, expend funds, or  
19 undertake any construction activities until DWR has complied with CEQA.

20 26. A stay or injunction of DWR actions relating to the Project would not be against  
21 the public interest because (a) DWR is required by CEQA to conduct an adequate environmental  
22 review of the Project before taking any actions to approve it, (b) construction and operation of the  
23 Project will have significant irreparable impacts on the environment and persons, and such  
24 activities, along with the expenditure of funds in furtherance of those activities, will prejudice  
25 DWR’s consideration of alternatives to the Project in any remedial CEQA review conducted  
26 pursuant to a decision of this Court, and (c) DWR will not be harmed by a stay or injunction.

**FIRST CAUSE OF ACTION**  
***Violations of CEQA***

1  
2  
3 27. Petitioners reallege and incorporate by reference each and every allegation set  
4 forth above.

5 28. Petitioners and other commenters raised substantial comments in response to the  
6 DEIR and FEIR. As noted, Petitioners' comments are attached hereto as Attachments B through  
7 G. The attachments provide greater specificity regarding the allegations herein. Petitioners  
8 hereby incorporate their and other commenters' comments to the DEIR and FEIR, DWR's  
9 responses thereto, and further submittals regarding the Project required to be included in the  
10 Administrative Record.

11 29. DWR's actions in certifying the FEIR, adopting related findings and a Statement  
12 of Overriding Considerations, and approving the Project constitute a prejudicial abuse of  
13 discretion in that DWR failed to proceed in the manner required by law and its actions are not  
14 supported by substantial evidence under Public Resources Code section 21166 and California  
15 Code of Regulations, title 14, sections 15162 to 15164. Specifically:

16 a. DWR failed to adequately analyze the Project's potential direct, indirect,  
17 and cumulative impacts in multiple key areas and, accordingly, also failed to adequately consider  
18 and identify appropriate associated mitigation measures and alternatives. As examples, but not  
19 the exclusive basis for this allegation, DWR failed to treat impacts to water supply as an impact  
20 for analysis in the FEIR and did not consider the Project's impacts to the health of Delta residents  
21 from 15 to 20 years of large-scale construction activity.

22 b. DWR failed to provide a clear, stable, and consistent project description.  
23 For example, but not to be considered the exclusive basis for this allegation, the project  
24 description in the FEIR does not describe the full extent of the Project's reasonably foreseeable  
25 operations (e.g., the quantity and timing of water to be diverted at the north Delta and south Delta  
26 intakes, and how the SWP and Central Valley Project (CVP) will be operated with the Project in  
27 place, given the coordinated operations of those projects), does not contain the same limitations  
28 included in modeling, and includes undefined and vague terms. An adequate project description



1 is essential to understanding and drawing meaningful conclusions about the Project's effects on  
2 the Delta environment.

3 c. DWR used an unreasonable future baseline for analysis of Project impacts  
4 because DWR failed to adequately analyze and provide information pertaining to the reasonably  
5 foreseeable conditions and requirements expected to exist when the Project is constructed and  
6 becomes operational, including but not limited to, reasonably foreseeable conditions related to  
7 climate change, such as, for example, the rising sea level, levee failures, or the reasonably  
8 foreseeable use of temporary urgency change petitions. Additionally, DWR did not take into  
9 account reasonably foreseeable land uses that will be in existence when the Project is constructed  
10 and becomes operational, and thus did not include the ecological and other benefits from such  
11 land uses in the baseline for purposes of its impact analysis. Due to the lack of information and  
12 analysis with regard to the baseline, the FEIR also fails as an informational document.

13 d. Numerous impacts analyses in the FEIR fail to comply with CEQA  
14 because they are not supported by substantial evidence; and/or fail to provide the information  
15 necessary for the public to understand the complete scope of the Project's potential impacts;  
16 and/or fail to provide the information necessary for the public to understand the modeling,  
17 assumptions, or methodology used to analyze the Project's potential impacts; and/or fail to  
18 disclose the basis for DWR's findings and conclusions; and/or rely on deferred analysis and  
19 investigation; and/or fail to comport with existing laws that were enacted to protect the Delta. As  
20 examples, but not as an exclusive list of grounds for this allegation: (1) DWR's failure to analyze  
21 impacts resulting from the reasonably foreseeable operation of the Project renders its impacts  
22 analyses as to, for example (but not limited to), surface water resources, water supply changes,  
23 and water quality inadequate; (2) DWR failed to adequately analyze (and mitigate) and provide  
24 sufficient information regarding its analysis of, and/or lacks substantial evidence to support its  
25 findings regarding, impacts on groundwater resources, including but not limited to impacts on the  
26 SASb and potential conflicts with implementation of the SASb GSP, impacts to shallow  
27 groundwater zones and related impacts to groundwater-dependent ecosystems, and potential  
28 increases in groundwater storage; (3) DWR failed to adequately analyze (and mitigate) and

1 provide sufficient information regarding its analysis of, and/or lacks substantial evidence to  
2 support its findings regarding, potential impacts to the Town of Hood’s water service; (4) DWR  
3 failed to provide adequate information regarding the Project’s use and sources of water during  
4 construction and operation; (5) DWR failed to consider, analyze, and discuss reasonably  
5 foreseeable climate change conditions expected to exist during Project construction and operation  
6 (e.g., including but not limited to droughts, sea level rise, levee failures, and flooding) and its  
7 assumptions as to future sea levels and methodology for evaluating sea level rise are unclear and  
8 not supported by substantial evidence—thus masking the severity of the Project’s impacts as to,  
9 including but not limited to, reverse flows, groundwater, and water quality; (6) DWR’s water  
10 quality impact analysis fails to discuss and evaluate the impacts of reasonably foreseeable Project  
11 operations decisions, such as the use of temporary urgency change petitions; (7) DWR failed to  
12 adequately analyze (and mitigate) and provide sufficient information regarding its analysis of,  
13 and/or lacks substantial evidence to support its findings regarding, impacts on water quality and  
14 water supply; and (8) DWR’s method of computing and presenting summary statistics is flawed  
15 and lacks substantial evidence.

16 e. DWR’s failure to include sufficient information in the FEIR for the public  
17 to understand the full range of Project operations (for example, but not limited to, how much  
18 water will be diverted at the north Delta intakes and the south Delta intakes and the timing of  
19 such diversions), the vagueness, ambiguity, and uncertainty as to the description of the Project’s  
20 operations, and the failure to analyze reasonably foreseeable operational actions renders its  
21 impacts analyses and alternatives analyses inadequate, especially as to (but not limited to) areas  
22 of impacts that may be affected by reduced water supplies in the Sacramento River.

23 f. DWR adopted thresholds of significance that are not supported by  
24 substantial evidence and reduce the potential significance of Project impacts, including but not  
25 limited to impacts on water quality, groundwater, agriculture, transportation, aesthetics, and noise.  
26 The FEIR further fails as an informational document because DWR failed to explain why it  
27 adopted certain thresholds of significance.  
28

1           g.       DWR failed to adequately analyze Project impacts because it determined  
2 certain impacts, such as noise impacts discussed in Petitioners' comments, would be less than  
3 significant based solely on its chosen thresholds of significance, while failing to consider and  
4 resolve fair arguments based on substantial evidence that the Project would result in significant  
5 environmental effects irrespective of whether DWR's selected threshold of significance has been  
6 exceeded.

7           h.       The FEIR fails as an informational document because DWR failed to  
8 discuss and address the Project's impacts considering reasonably foreseeable circumstances  
9 expected to exist during construction and when the Project is operational as a result of climate  
10 change, and the Project's impacts on reasonably foreseeable existing land uses.

11           i.       The size and structure of the FEIR frustrates public participation in  
12 violation of CEQA and fails to present information in a manner reasonably calculated to inform  
13 the public. As examples but not the exclusive basis for this allegation: the location of stated  
14 evidence supporting findings is not identified; the analyses of impacts are scattered throughout,  
15 with conclusions often far-removed from the evidence that purportedly supports them; or no  
16 evidence is presented to support findings.

17           j.       DWR failed to adequately respond to numerous substantive comments and  
18 recommendations provided in response to the DEIR, including comments supported by detailed  
19 technical and expert evidence, in areas including but not limited to the modeling that formed the  
20 basis for DWR's analysis and impact determinations, the methodology and evidence used to  
21 analyze the Project's environmental impacts, the range of alternatives and alternatives analysis,  
22 and the failure to model and identify potential impacts relating to the reasonably foreseeable  
23 operation of the Project as a result of climate change. Many responses to comments contain  
24 conclusory statements that are unsupported by substantial evidence in the record. Numerous  
25 responses do not fully respond to the comments as submitted, or otherwise reflect a good faith,  
26 reasoned analysis of the comments.

27           k.       DWR failed to analyze and/or adopt adequate and feasible mitigation  
28 measures to mitigate the Project's potentially significant impacts, and/or improperly deferred

1 mitigation as explained in incorporated comments. As an example, but not the exclusive basis for  
2 this allegation, Mitigation Measure GW-1 is too narrow and vague to adequately mitigate the  
3 groundwater impacts from the Project, does not include a threshold of significance that is relevant  
4 for natural ecosystems dependent on shallow groundwater conditions, and fails to include  
5 reasonable options for mitigating impacts.

6 l. DWR adopted mitigation measures that are not fully enforceable through  
7 permit conditions, agreements, or other legally binding instruments. As one example, but not the  
8 exclusive basis for this allegation, DWR failed to show how its self-imposed Project operational  
9 criteria will be enforceable, rendering its export capacity analysis inadequate.

10 m. The FEIR improperly incorporates mitigation measures into the Project  
11 description. As an example, but not the exclusive basis for this allegation, DWR characterized  
12 “environmental commitments” as part of the Project; however the “environmental commitments”  
13 are plainly mitigation measures.

14 n. The FEIR does not contain all of Petitioners’ comments to the DEIR as  
15 required under CEQA.

16 o. DWR adopted unreasonably narrow project objectives that precluded  
17 consideration of reasonable alternatives for achieving the project’s underlying purpose. The  
18 objectives are also inconsistent with the 2020 Water Resilience Portfolio In Response to the  
19 Executive Order N-10-19, prepared by the California Natural Resources Agency, et al.  
20 (Portfolio), as well as the Delta Reform Act of 2009. As an example, but not the exclusive basis  
21 for this allegation, DWR excluded improvements to existing Delta levees from the objectives in  
22 support of the Project’s purpose. The Project’s objectives should be expanded to include  
23 prevention of water quality degradation in the Delta and avoidance of adverse impacts to current  
24 land uses and communities in the Delta, which is consistent with the Delta Plan.

25 p. DWR failed to demonstrate the Project is consistent with regional plans.  
26 For example, but not the exclusive basis for this allegation, DWR’s finding that the Project is  
27 consistent with the Delta Reform Act of 2009 is not supported by substantial evidence.  
28

1           q.       DWR failed to identify a range of reasonable alternatives to the Project and  
2 failed to meaningfully analyze reasonable alternatives to the Project that would reduce or avoid  
3 the significant environmental impacts of the proposed project. As examples, but not the exclusive  
4 basis for this allegation: the alternatives analysis is inconsistent with the Portfolio and the Delta  
5 Reform Act of 2009; DWR's two-level filtering criteria for the consideration of feasible  
6 alternatives to the Project lacks substantial evidence; DWR ignored evidence of viable,  
7 potentially feasible environmentally superior alternatives to the Project that could achieve the  
8 Project's objectives; and the FEIR is legally inadequate because it contains an overly narrow  
9 range of alternatives considering the nature of the Project and its environmental effects.

10           r.       DWR's selection of intake siting alternatives to the Project in the FEIR is  
11 unreasonable and lacks substantial evidence, and did not support a reasoned choice based on the  
12 purpose and requirements of CEQA, particularly in light of the Project's significant impacts on  
13 residents of the Town of Hood and surrounding historic Delta communities and given the  
14 changed and reasonably foreseeable conditions that will exist in the Delta during the Project's  
15 construction and operation due to climate change.

16           s.       The alternatives analysis fails to comply with CEQA because the  
17 alternatives evaluated in the EIR were not developed or selected for consideration based on  
18 comparison with the DEIR's proposed project, as required by CEQA. Rather, the DEIR  
19 alternatives were developed based on a fundamentally different (and infeasible) project, the  
20 proposed project as described in the Notice of Preparation.

21           t.       DWR failed to analyze the physical and mental public health impacts from  
22 long-term exposure to prolonged Project-related noise pollution, despite having substantial  
23 evidence supporting further analysis, and failed to discuss environmental justice concerns in that  
24 regard. By failing to properly analyze those impacts and by omitting information necessary for  
25 the public and decision makers to understand the Project's impacts in that regard, the FEIR fails  
26 as an informational document.

27           u.       DWR failed to analyze the full range of health impacts from Project-related  
28 air pollution, despite having substantial evidence supporting the need for further analysis, and

1 failed to discuss environmental justice concerns in that regard. By failing to properly analyze  
2 those impacts and by omitting information necessary for the public and decision makers to  
3 understand the Project's impacts in that regard, the FEIR fails as an informational document.

4 v. DWR failed to properly describe the baseline physical conditions in its air  
5 pollution analysis, which infected the analysis of the Project's potential environmental impacts  
6 and failed to inform the public regarding the Project's potential environmental impacts as to air  
7 pollution and consistency with regional air quality plans.

8 w. DWR failed to use the best available and sound science to analyze Project  
9 impacts, including but not limited to, for example, water quality.

10 x. The public trust findings are not supported by substantial evidence.

11 y. DWR's findings that the Project is consistent with the Portfolio are not  
12 supported by substantial evidence.

13 z. The Statement of Overriding Considerations is not supported by substantial  
14 evidence. Any failure to disclose the true scope of Project impacts cannot be cured by a finding  
15 that an impact is significant and unavoidable, and DWR's finding that the Project's benefits  
16 outweigh its significant impacts is not supported by substantial evidence due to the FEIR's failure  
17 to adequately evaluate and disclose all of the Project's significant impacts, among other flaws.

18 aa. The finding that the Project is the environmentally superior alternative is  
19 not supported by substantial evidence.

20 30. DWR violated CEQA by certifying the FEIR and approving the Project without  
21 conforming to the requirements of CEQA. DWR's certification of the FEIR and its approval of  
22 the Project must be set aside.

23 31. Given the prejudicial abuses of discretion applicable to the certification of the  
24 FEIR and approval of the Project, the FEIR is also inadequate for purposes of use by responsible  
25 agencies in evaluating Project-related permits and approvals. Findings as to the adequacy of the  
26 FEIR for purposes of responsible agency approvals are not supported by substantial evidence.  
27  
28

**SECOND CAUSE OF ACTION**  
***Violation of the 1959 Delta Protection Act***

1  
2           32.     Petitioners reallege and incorporate by reference each and every allegation set  
3 forth above.

4           33.     A controversy exists between DWR and Petitioners regarding the Project’s  
5 compliance with/violation of the 1959 Delta Protection Act (Wat. Code, § 12200 et seq.).  
6 Petitioners are informed and believe, and on that basis allege, that DWR believes the Project is in  
7 compliance with the 1959 Delta Protection Act, whereas Petitioners believe the Project is  
8 inconsistent with and violates the 1959 Delta Protection Act.

9           34.     The 1959 Delta Protection Act: (a) requires the SWP and the CVP to provide  
10 salinity control and an adequate water supply for the Delta (Wat. Code, §§ 12201, 12202);  
11 (b) prohibits the export of water from the Delta to which in-Delta users are entitled and water  
12 which is necessary for salinity control (Wat. Code, § 12204); (c) requires that the water supply be  
13 sufficient “to maintain and expand agriculture, industry, urban and recreational development in  
14 the Delta” (Wat. Code, § 12201); (d) requires maintenance of a “common source of fresh water”  
15 in the Delta to serve both in-Delta water needs and export water needs when water surplus to the  
16 in-Delta needs is available (Wat. Code, § 12201); and (e) requires all releases of water from  
17 storage reservoirs into the Delta for export from the Delta to be integrated to the “maximum  
18 extent possible” in order to fulfill the objectives of the Act (Wat. Code, § 12205).

19           35.     The Project violates the 1959 Delta Protection Act in numerous respects, including  
20 but not limited to: the Project, by design, directly circumvents the maintenance and provision of  
21 the “common source of freshwater” (or “common pool”) through the construction of intakes and a  
22 tunnel in the northern Delta to enable DWR to divert and export substantial amounts of  
23 Sacramento River freshwater directly into a tunnel that would otherwise flow into that common  
24 pool in the absence; and the Project in many instances will result in the export of water from the  
25 Delta that directly deprives in-Delta water users of that supply and quality.

26           36.     Such a bypass deprives essentially the entirety of the Delta of the common salinity  
27 control and other benefits mandated by the 1959 Delta Protection Act that such fresh water would  
28 provide if it flowed into the common pool before it was exported.





**FOURTH CAUSE OF ACTION**

***Violation Of The Watershed Protection Act And Area Of Origin Protections***

43. Petitioners reallege and incorporate by reference each and every allegation set forth above.

44. A controversy exists between DWR and Petitioners regarding the Project's compliance with/violation of the Watershed Protection Act (Wat. Code, § 11460 et seq.) and area of origin protections (Wat. Code, § 1215 et seq.). Petitioners are informed and believe, and on that basis allege, DWR believes the Project is in compliance with the foregoing laws, whereas Petitioners believe the Project is inconsistent with and violates the foregoing laws.

45. Water Code section 11460 of the Watershed Protection Act addresses the prior rights to water reasonably required to adequately supply the beneficial needs of a watershed, area in which water originates (or immediately adjacent areas thereto which can conveniently be supplied with water therefrom), or any of the inhabitants or property owners therein. Water Code section 1216 likewise protects water from export, as discussed therein.

46. The Project is inconsistent with the foregoing policies and requirements and will divert fresh water from the Delta that will deprive the Delta and its communities and residents of their prior right to have that water flow into and through the Delta to meet their beneficial needs.

47. For the foregoing reasons, DWR failed to act in the manner required by law and prejudicially abused its discretion in approving the Project in violation of the Water Protection Act and area of origin protections.

**FIFTH CAUSE OF ACTION**

***Violation Of The Delta Reform Act Of 2009 And The Delta Plan***

48. Petitioners reallege and incorporate by reference each and every allegation set forth above.

49. A controversy exists between DWR and Petitioners regarding the Project's compliance with/violation of the Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.). DWR believes the Project is in compliance with the Delta Reform Act of 2009, whereas Petitioners believe the Project is inconsistent with and violates the Delta Reform Act of 2009.



1 is to preserve and protect public trust resources for the common use of the people, as well as  
2 water's function as natural habitat, including protecting habitat for wildlife.

3 56. An agency's duty to perform a public trust analysis prior to approving a project is  
4 not necessarily discharged by virtue of performing CEQA review. Instead, public agencies have  
5 an independent duty to perform a public trust consistency analysis, based on substantial evidence  
6 in the record, as part of an adequate CEQA review.

7 57. A controversy exists between DWR and Petitioners regarding the Project's  
8 compliance with and/or violation of the public trust doctrine. As explained in its public trust  
9 findings, DWR maintains the Project is in compliance with the public trust doctrine, whereas  
10 Petitioners maintain that it is not.

11 58. DWR's failure to adequately consider and analyze the public trust in approving the  
12 Project will harm trust resources and Petitioners' and the people's rights and interests in those  
13 resources and thus violates the public trust doctrine. As an example but not the exclusive basis  
14 for this allegation, DWR has failed to analyze how the Project will impact and affect  
15 interconnected navigable waterways and the water's function as natural habitat, including impacts  
16 on wildlife (such as, for example, the protected greater sandhill crane), in light of the Project's  
17 reasonably foreseeable reduction of groundwater levels and DWR's failure to analyze the impact  
18 in light of land uses and projects that will be in existence when the Project is constructed and  
19 becomes operational. As another non-exclusive example, DWR has failed to adequately analyze  
20 how the Project will affect Delta water quality, including the formation of harmful algal blooms,  
21 that will have substantial adverse effects on the public trust uses of recreation and fishing.

22 59. By failing to adequately consider, analyze and protect the public trust, DWR  
23 violated the state's duty to protect public trust resources. The inadequacy of the FEIR with regard  
24 to the public trust findings also means that responsible agencies with an obligation to protect the  
25 public trust, including but not limited to the SWRCB and California Department of Fish and  
26 Wildlife, will not have sufficient information and evidence to conduct their own legally adequate  
27 public trust analysis and findings, or issue any discretionary approvals for the Project.  
28

**PRAYER FOR RELIEF**

WHEREFORE, Petitioners pray for the following relief:

1. For an order staying the effect of DWR’s certification of the FEIR and approval of the Project;
  2. For a declaration under Code of Civil Procedure section 1060 that DWR’s approval of the Project:
    - a. Violates the state laws enacted to protect the Delta, as discussed herein;
    - b. Is inconsistent with the Delta Reform Act of 2009; and
    - c. Violates the public trust doctrine;
  3. For issuance of a temporary restraining order, preliminary injunction, and permanent injunction prohibiting any actions by DWR pursuant to DWR’s approval of the Project and certification of the FEIR for the Project until DWR has fully complied with all requirements of CEQA and all other applicable state and local laws, policies, and regulations;
  4. For a peremptory writ of mandate directing DWR to:
    - a. Vacate and set aside its certification of the FEIR for the Project and all approvals of the Project;
    - b. Suspend any and all activity pursuant to DWR’s approval of the Project that could result in an adverse change or alteration to the physical environment until DWR has complied with all requirements of CEQA and all other applicable state and local laws, policies, ordinances, and regulations as are directed by this Court pursuant to Public Resources Code section 21168.9; and
    - c. Prepare, circulate, and consider a new and legally adequate EIR for the Project and otherwise to comply with CEQA and the public trust doctrine prior to any subsequent action taken to approve the Project;
  5. For costs of suit;
  6. For reasonable attorney fees pursuant to Code of Civil Procedure section 1021.5;
- and,

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7. For such other and further relief as the Court deems just and proper.

SOMACH SIMMONS & DUNN  
A Professional Corporation

DATED: February 16, 2024

By: Kelley M. Taber  
Kelley M. Taber  
Attorneys for Petitioners and Plaintiffs  
County of Sacramento and Sacramento County  
Water Agency

# Exhibit 2





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## County of Sacramento

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December 16, 2022

*Via Electronic Mail Only*

Department of Water Resources  
Attention Delta Conveyance Office  
P.O. Box 942836  
Sacramento, CA 94236-0001  
[deltaconveyancecomments@water.ca.gov](mailto:deltaconveyancecomments@water.ca.gov)

**Re: County of Sacramento Comments on the Delta Conveyance Project Draft Environmental Impact Report**

Dear Department of Water Resources:

The County of Sacramento submits the following comments on the Draft Environmental Impact Report (DEIR) prepared by the Department of Water Resources (DWR) for the Delta Conveyance Project (DCP or Project). In our comments eight years ago on a prior iteration of this Project, we stated that “[the project] will irreversibly alter and, in many cases, permanently destroy the generations-old socioeconomic fabric and physical landscape of the Delta.” That assessment has not changed for this slightly downsized version of the Project. The current DEIR similarly fails to recognize the scope of significant environmental impacts, overstates the effectiveness of its proposed mitigation measures, fails as an informational document and summarily abandons viable alternatives that address the DEIR’s core objectives.

The DCP would change the face of the Delta through the construction and operation of multiple industrial facilities in previously natural, agrarian settings. In Sacramento County alone, DWR would construct two intake diversion facilities totaling 232 acres adjacent to the Town of Hood, two 14-acre concrete batch plants at Lambert Road, a 222-acre double-launch shaft at Twin Cities Road and a 214-acre, 15-foot high reusable tunnel material pile at the “Twin Cities Complex.” The total Delta footprint of the proposed project (Alternative 5 or the Bethany Alternative) would occupy 1,313.75 acres.<sup>1</sup>

In addition to these scars upon the Delta landscape, the Project would divert up to 6,000 cubic feet/second of Sacramento River water at the Hood intakes. This is more than half of the capacity of the existing State Water Project Banks pumping plant and more than the capacity of the CVP Jones pump at Tracy.<sup>2</sup> Under certain conditions, diversions would remove 25% to 33% of the Sacramento River water downstream of the intakes.<sup>3</sup> The DEIR acknowledges that:

“[T]here are consistent decreases among project alternatives in long-term average flows for all months on the Sacramento River north of Courtland (i.e., downstream of the proposed north

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<sup>1</sup> DEIR, p. 3-20.

<sup>2</sup> DEIR, pp. 6-13, 6-19.

<sup>3</sup> DEIR, p. 3-155 (e.g., Oct.-Nov. diversions up to 5,000 cfs during 20,000 cfs Sac River flows).

Delta intakes) due to the diversions of available excess water at the proposed north Delta intakes beyond the needs to satisfy downstream regulatory requirements in the Delta, including Delta outflows...”<sup>4</sup>

One consequence of these reductions would be as follows:

“...the magnitude and duration of reverse flows...decrease as inflow of the Sacramento River increases. Consequently, reduced Sacramento River inflow increases the frequency of reverse flows at this junction..., thereby increasing the proportion of fish that are entrained into the interior Delta, where mortality is high...”<sup>5</sup>

DWR proposes to override and accept these significant impacts notwithstanding the availability of one or more alternatives that avoid the Project’s worst effects while meeting the core objective. The DEIR repeatedly laments the condition of Delta levees and their susceptibility to rising water levels caused by climate change.<sup>6</sup> Yet, when presented with multiple viable proposals involving strengthening and raising Delta levees (“Portfolio” alternatives at pp. 3A-18 and 3A-24, “Water Plan” at p. 3A-16), the DEIR cursorily dispenses with them, depriving the public of full consideration of options that could preserve the Delta’s health and natural character.

Construction and operation of the Project, which proposes to construct new diversion and conveyance facilities to carry water from points in the north Delta through an underground system to facilities in the south Delta, will significantly transform current landside and hydrologic conditions in the Delta. The Project will significantly and adversely affect Sacramento County residents and businesses in a multitude of ways both immediate and permanent. County historic communities and their residents will bear a disproportionate burden of the Project’s numerous significant unavoidable environmental impacts, for the exclusive benefit water users south of the Delta. The proposed facilities also will slow or prevent the realization of the Delta National Heritage Area’s economic development, tourism, and historic preservation goals that are critical to maintaining the “Delta as a Place.”

The Project also may significantly impact water supplies in the County. The Sacramento County Water Agency (SCWA), which currently supplies potable and recycled water to approximately 150,000 users throughout its service area, is among the regional water purveyors most affected by Project impacts. SCWA’s service area includes the major growth areas of Sacramento County, south of Jackson highway and east of State Route 99, which are anticipated to accommodate roughly 100,000 new persons and more than 20,000 new connections by buildout. SCWA’s detailed comments on the DEIR and Project—citing major concerns regarding potentially significant impacts to the Freeport Regional Water Project from reverse flow events in the Sacramento River, as well as to the Sacramento region’s and Delta residents’ water supply through impacts to surface and groundwater quality and changes in upstream reservoir operations—are submitted separately and incorporated into these comments by reference.

As expressed throughout these comments, uncertainties about critical details of the Project, including construction, operations, potentially significant impacts, and mitigation, are hugely problematic for a public

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<sup>4</sup> DEIR, p. 5-2, lines 2-6; see also p. 5-27, lines 6-11.

<sup>5</sup> DEIR, p. 12-17, lines 26-30.

<sup>6</sup> See, e.g., DEIR, pp. ES-2, lines 32-35; ES-7, lines 9-13; p. 1-14, lines 11-14; p. 1-15, lines 4-5; pp. 1-15 to 1-18.

infrastructure project of this scale. The proposed plan and preferred Project (Alternative No. 5) has the potential to permanently damage the Delta as a whole, as well as result in irreversible and significant physical, environmental, and socioeconomic impacts to the portion of the Delta within unincorporated Sacramento County, including established legacy communities. The DCP also will violate several state laws intended to protect the Delta and Delta water users from the Project's impacts.

Based on our review of the DEIR and appendices, we have concluded that the Project has the potential to cause significant impacts to Sacramento County residents and businesses and to the environment in the Delta, many of which the DEIR fails to identify and mitigate in violation of CEQA. These comments, which were prepared in consultation with technical experts on hydrology, water quality, groundwater and more, identify several key areas where the DEIR is deficient and where DWR has failed to proceed in the manner required by the California Environmental Quality Act (CEQA), including:

- Adoption of inappropriately narrow project objectives which preclude consideration of a reasonable range of alternatives
- Failure to provide a clear and consistent project description
- Failure to provide information necessary for the public and decision-makers to meaningfully evaluate the Project's impacts, or to present information in a manner that is meaningful and useful to the public and decisionmakers
- Failure to identify and consult with responsible agencies as required by CEQA and the Delta Plan
- Failure to use the best available and sound science to analyze Project impacts
- Failure to identify a reasonable range of alternatives to the Project
- Inadequate and improper identification of mitigation measures
- Improper use of analytical methodology which obscures and disguises Project impacts as less significant than they are
- Failure to adequately identify, analyze, and mitigate significant impacts resulting from Project construction and operation
- Failure to support conclusions with substantial evidence

“An EIR is an ‘environmental “alarm bell” whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.’ The EIR is also intended ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.’”<sup>7</sup> Courts have held that an EIR is a “document of accountability,” reasoning that “[i]f CEQA is scrupulously followed, the public will know the basis on which its responsible

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<sup>7</sup> *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 499, citing *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376.

officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.”<sup>8</sup> In order for this process to work as it should, “[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.”<sup>9</sup> The DEIR, by failing to meet these requirements and omitting information necessary for readers to engage in independent review of the Project’s impacts, must be revised and recirculated for public comment in accordance with CEQA.

## I. PROJECT OBJECTIVES

A project’s objectives should not be so narrowly defined that they preclude consideration of reasonable alternatives for achieving the project’s underlying purpose.<sup>10</sup>

In 2019, Governor Newsom signed Executive Order N-10-19 directing state agencies to establish a “set of actions to meet California’s water needs through the 21st century,” giving rise to the California Water Resilience Portfolio. Recognizing that “no single solution can fully address the state’s water challenges,” the Portfolio identified a suite of actions aimed at addressing issues of water supply reliability and environmental protection using a “broad, diversified approach,” including a plan to “modernize conveyance of a critical portion of the state’s water supply through the Sacramento-San Joaquin Delta.”<sup>11</sup>

Proposed by DWR, the DCP’s stated purpose is “to restore and protect the reliability of SWP water deliveries and, potentially, CVP water deliveries south of the Delta, consistent with the State’s Water Resilience Portfolio in a cost-effective manner.”<sup>12</sup> Several related objectives follow this fundamental purpose:

- To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events.
- To minimize the potential for public health and safety impacts from reduced quantity and quality of SWP water deliveries, and potentially CVP water deliveries, south of the Delta as a result of a major earthquake that could cause breaching of Delta levees and the inundation of brackish water into the areas where existing SWP and CVP pumping plants operate in the southern Delta.
- To protect the ability of the SWP, and potentially the CVP, to deliver water when hydrologic conditions result in the availability of sufficient amounts of water, consistent with the requirements of state and federal law, including the California and federal Endangered Species Acts and Delta Reform Act, as well as the terms and conditions of water delivery contracts and other existing applicable agreements.

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 668; *In re Bay-Delta Programmatic Env’t Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1166.

<sup>11</sup> California Water Resilience Portfolio, July 2020, pp. 5, 7, available at [https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/Final\\_California-Water-Resilience-Portfolio-2020\\_ADA3\\_v2\\_ay11-opt.pdf](https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/Final_California-Water-Resilience-Portfolio-2020_ADA3_v2_ay11-opt.pdf).

<sup>12</sup> DEIR, p. 2-2, lines 24-26.

- To provide operational flexibility to improve aquatic conditions in the Delta and better manage risks of further regulatory constraints on project operations.<sup>13</sup>

The Water Resilience Portfolio was designed to facilitate innovation in the face of a changing climate and challenges to water security.<sup>14</sup> The Governor's Executive Order directing establishment of the Portfolio mandated a comprehensive approach to solving the state's water needs, identifying seven principles on which the Portfolio was to be based:

- 1) Prioritize multi-benefit approaches that meet several needs at once
- 2) Utilize natural infrastructure such as forests and floodplains
- 3) Embrace innovation and new technologies
- 4) Encourage regional approaches among water users sharing watersheds
- 5) Incorporate successful approaches from other parts of the world
- 6) Integrate investments, policies, and programs across state government
- 7) Strengthen partnerships with local, federal, and tribal governments, water agencies and irrigation districts, and other stakeholders.<sup>15</sup>

In light of the Water Resilience Portfolio's clear directive, repeated often throughout its pages, that reliance on any one water source must be reduced and water supplies must be diversified,<sup>16</sup> it is clear that the Project's objectives are too narrowly defined, focusing only on benefits to State Water Project operations and south of Delta water deliveries. As described more fully in the following sections, the Project falls short of achieving the above principles. The unreasonably narrow range of proposed alternatives, discussed in Section III, do not offer the range of multi-benefit approaches designed to meet multiple needs outlined in Principle 1, but this could be addressed with the addition of an alternative proposing through-Delta conveyance and including a mechanism for levee improvements and maintenance. A through-Delta conveyance alternative also would avoid conflicts with current land uses in the Delta, consistent with the Delta Plan Policy P2. (See Section VI.)

The Project is in direct conflict with Principle 6's call for the integration of investments, policies, and programs across governments, due to the Project's potentially adverse impacts to regional programs and projects, such as the Harvest Water program being implemented by the Sacramento Regional County Sanitation District (Regional San), discussed in detail in that agency's comments on the proposed Project and incorporated by reference herein. DWR's failure to consult with agencies in the preparation of the DCP likewise makes the Project inconsistent with both this principle and Principle 7's edict to strengthen

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<sup>13</sup> *Id.*, pp. 2-2 to 2-3, lines 23-38, 1-4.

<sup>14</sup> California Water Resilience Portfolio, July 2020, p. 6, available at [https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/Final\\_California-Water-Resilience-Portfolio-2020\\_ADA3\\_v2\\_ay11-opt.pdf](https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/Final_California-Water-Resilience-Portfolio-2020_ADA3_v2_ay11-opt.pdf).

<sup>15</sup> *Id.*, pp. 6-7.

<sup>16</sup> *Id.*, p. 5..



partnerships with local, federal, and tribal governments, water agencies, and irrigation districts, and other stakeholders.

The objectives reference providing “operational flexibility to improve aquatic conditions in the Delta,” yet the Project does not commit to improving aquatic conditions, nor does it include any objectives that would protect water quality in the Delta from degradation. Further, the DEIR provides no evidence to demonstrate that the Project would be capable of improving aquatic conditions in the Delta, as explained more fully in Section VIII’s discussion of mitigation measures below. Indeed, the Project worsens aquatic conditions, including impacts to fish, rather than improving them.

A lead agency should not adopt artificially narrow project objectives that would preclude consideration of reasonable alternatives for achieving the project’s underlying purpose.<sup>17</sup> This approach is not only inconsistent with CEQA’s mandate to offer a reasonable range of alternatives and the Water Resilience Portfolio’s instruction to employ a diversified approach, but it is also inconsistent with the Delta Reform Act’s *coequal* goals of improving water supply reliability for the State (not just Delta exporters) *and* protecting, restoring, and enhancing the Delta ecosystem. The Project’s objectives should be expanded to include prevention of water quality degradation in the Delta and avoidance of adverse impacts to current land uses and communities in the Delta, which is consistent with the Delta Plan, as discussed further in Section VI. below.

## II. THE DEIR’S SIZE AND STRUCTURE FRUSTRATES PUBLIC PARTICIPATION IN VIOLATION OF CEQA

CEQA requires that an EIR “be organized and written in a manner that will be meaningful and useful to decision makers and the public.”<sup>18</sup> An EIR should be written in a way that readers are not forced “to sift through obscure minutiae or appendices” to find important components of the analysis.<sup>19</sup> “Documents that are confusing in their presentation are incomprehensible to the very people they are meant to inform.”<sup>20</sup>

The sheer enormity of the DEIR, whose chapters and appendices amount to more than 20,000 pages, is prohibitive to an effective, independent review of the Project’s impacts. The Project’s analyses of impacts are scattered throughout, with conclusions often far-removed from the evidence that supports them, if the evidence is included at all. Support for conclusory findings is often buried deep in appendices, and cross-references directing readers to other sections or appendices for explanatory information are often vague and requires searching through reams of unrelated findings. The Delta Independent Science Board (DISB), for instance, found the information contained in the DEIR to be extremely difficult to navigate, noting that imprecise language and ill-defined terms further magnified its lack of clarity and incoherence. The DISB noted that often the most relevant information helpful to understanding potential Project impacts was haphazardly dispersed throughout the DEIR’s thousands of pages and dozens of chapters and appendices, making synthesis of impacts sometimes impossible. The Board also indicated that some of the document’s analyses omitted information

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<sup>17</sup> *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 203 (EIR for expansion of groundwater extraction failed to consider water conservation as alternative to increased groundwater extraction).

<sup>18</sup> Pub. Resources Code, § 21003(b).

<sup>19</sup> *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659; *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239.

<sup>20</sup> *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1987) 193 Cal.App.3d 1544, 1548.

critical to independent evaluation, and that many of the DEIR’s main chapters lacked information sufficient to evaluate methodologies used in impact analyses. Sacramento County and its consultants identified the same flaws and frustrations in attempting to review and understand the DEIR.

Readers “could not reasonably be expected to ferret out an unreferenced discussion” in the depths of a DEIR or supporting document.<sup>21</sup> “The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. Information ‘scattered here and there in EIR appendices’ or a report ‘buried in an appendix,’ is not a substitute for ‘a good faith reasoned analysis.’”<sup>22</sup> Reliance on information not actually incorporated or described and referenced in the DEIR indicates a failure to proceed in the manner provided in CEQA.

The DEIR contains countless examples of conclusions and findings for which supporting evidence is either not presented or buried in an appendix or external report. Readers who wish to evaluate the adequacy of such findings are often left to independently hunt down such evidence. For example, a description of the screening process for alternative intake locations, a critical issue of interest to Sacramento County and its residents, refers readers to “Attachment A to the Engineering Project Reports (Delta Conveyance Design and Construction Authority 2022a, 2022b)” with no page number or location of where such report and the analysis it contains can be found.<sup>23</sup> Other sections present conclusory statements regarding Project impacts but omit any relevant information necessary to evaluate the adequacy of such statements. Even if the DEIR contained adequate information to satisfy CEQA’s substantive requirements, which it does not, the failure to present such information in a manner reasonably calculated to inform the public renders is a prejudicial violation of CEQA’s informational mandate.

### III. PROJECT DESCRIPTION

Courts have long established that an accurate, stable, and consistent project description is an indispensable prerequisite to an informative and legally sufficient EIR. A project description that omits integral components of the project may result in an EIR that fails to disclose all of the impacts of the project.<sup>24</sup> Such accuracy and consistency in a project description is necessary in order for the public and decision makers to “ascertain the project’s environmentally significant effects, assess ways of mitigating them, and consider project alternatives.”<sup>25</sup>

Courts have linked the adequacy of an EIR’s project description with the adequacy of its analysis of a project’s impacts.<sup>26</sup> A legally adequate project description, in addition to being accurate and consistent, must discuss reasonably foreseeable activities and must not minimize project impacts.<sup>27</sup> An EIR that fails to provide a consistent description of the project and its impacts throughout the entire document prevents meaningful and

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<sup>21</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.

<sup>22</sup> *Ibid.*, quoting *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239.

<sup>23</sup> DEIR, Appendix 3A, pp. 3A-4 to 3A-5, lines 42, 1–2.

<sup>24</sup> *CEB Practice Under the California Environmental Quality Act*, 2nd Ed., § 12.2; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.

<sup>25</sup> *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 533.

<sup>26</sup> *See, e.g., Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376.

<sup>27</sup> *Lotus v. Department of Transp.* (2014) 223 Cal.App.4th 645; *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376.



intelligent evaluation by the public and decision makers and thus violates CEQA's requirement of public participation in the decision-making process.<sup>28</sup> If an EIR's project description is found to be deficient because it fails to discuss the entire project, the environmental analysis will likely reflect the same mistake.<sup>29</sup> "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law.' If the deficiencies in an EIR 'preclude[] informed decisionmaking and public participation, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred.'"<sup>30</sup>

The DEIR does not comport with the mandate that its project description and accompanying analyses be consistent throughout the EIR for several reasons, including numerous references to Project components so vague that readers could not possibly evaluate their impacts, and the omission of reasonably foreseeable Project operational aspects that could significantly affect Delta stakeholders.

#### **A. The DEIR Omits Description of Crucial Project Elements, Thereby Obscuring Impacts and Preventing Independent Review**

The DEIR fails to fulfill its essential purpose as an informational document due to its tendency to omit critical information in some instances and to mislead the reader by presenting inconsistent information about Project details in others. It fails to present clear and concise summaries of key elements of the Project, which serves to mislead the public about the Project's true scope. In some many chapters it offers only cursory explanations of critical Project components, while in others it leaves out entirely the information necessary to evaluate all aspects of the Project's construction and operations. For example, several chapters refer to "soil conditioners," chemical additives to be mixed with soil excavated during the tunnel boring procedure.<sup>31</sup> Despite asserting that they would be "nontoxic and biodegradable," the DEIR, without offering any explanation of their chemical profile, acknowledges that "conditioners or additives used to facilitate tunneling could cause eye and skin irritation if mishandled."<sup>32</sup> The Sacramento Environmental Commission, in its comments on the DEIR, noted that soil conditioners:

[P]rimarily consist of foaming agents and lubricants . . . typically composed of anionic surfactants such as sodium lauryl ether sulphate (SLES) or sodium lauryl sulphate (SLS). SLS/SLES and similar surfactants are classified as hazardous for their corrosive character and toxicity to aquatic life. Most surfactants are classified as skin irritants, while some can cause more serious damage. In raw form, SLS is categorized as moderately toxic to aquatic life. Other surfactants have been categorized as harmful to aquatic lifeforms. The level of toxicity is dependent on the concentration of SLS, the specific species exposed to discharges, water chemistry, and water temperature.<sup>33</sup>

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<sup>28</sup> *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 197.

<sup>29</sup> *CEB Practice Under the California Environmental Quality Act*, 2nd Ed., § 12.7; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376.

<sup>30</sup> *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220, citing *Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 118.

<sup>31</sup> See, e.g., DEIR, Ch. 3, p. 3-32, lines 18-20; Ch. 25, p. 25-24, lines 25-33, p. 25-36, lines 14-20.

<sup>32</sup> DEIR, Ch. 25, p. 25-36, lines 17-19.

<sup>33</sup> Sacramento Environmental Commission, DCP DEIR Comment Letter, Sept. 21, 2022, p. 2.

The DEIR omits any discussion of the potential for toxicity in these chemical additives, and no evidence for its conclusion that their use will not cause any significant impacts.

Additional omissions of essential or consistent information in the DEIR's Project Description include:

- Failure to specify the supply source or the method of transportation for aggregate material that will be brought to the site, stored, and used at the concrete batch plants for construction of the tunnel.<sup>34</sup> The DEIR does not identify impacts to County roads outside of the immediate construction area, but all roads that experience a marked increase in truck traffic as a result of Project construction activity, particularly if those trucks are hauling heavy loads such as aggregate, will be impacted. Materials delivered via County roads should be identified and off-site impacts to County roadways analyzed.
- Inconsistency in post-construction reclamation activities. A description of concrete batch plants that will be constructed, two located at Lambert Road and Franklin Boulevard within the County, indicates that the batch plant structures and equipment will be removed following construction. Other sections, however, indicate that the Lambert Road plants will require 15 acres during construction and 14 acres post-construction, implying the plants will remain at the locations.<sup>35</sup> Still other sections mention reclamation efforts following tunnel construction that will include "areas used during construction for material and equipment laydown and staging, material stockpiles, slurry/grout mixing plants, parking areas, and facilities/trailers" but does not mention specifically concrete batch plants.<sup>36</sup> These inconsistencies make independent evaluation impossible.
- Failure to indicate which access and adjacent roads will be utilized during final overlays and final pavement restoration, leaving the County unable to assess which roads will be impacted or potentially left unrepaired.<sup>37</sup>
- Failure to adequately describe and analyze impacts from non-SWP water wheeled through the Project's new north Delta intakes. The Project Description explains that Project facilities "could provide the ability for water transfers to occur through the facility by providing increased capacity" and points readers to Appendix 3H for an analysis of increased available export capacity, which concludes that "even though the project may add additional export capacity, it is unlikely to increase the amount of water transfers, since the current capacity is not even fully utilized. For this reason, potential direct or indirect impacts of water transfers are not further discussed in this Draft EIR."<sup>38</sup> This confounding analysis leaves out any detail necessary to an assessment of impacts due to exports of water around the Delta through the new north-Delta intakes that would otherwise have flowed through the Delta. The illogical conclusion ignores that transfers are often prevented by lack capacity of the south Delta pumps, and a narrow transfer window due to limitations from biological opinions, and the NDD would provide a wider transfer window, enabling greater exports. If the NDD enables diversions at times when exports through the South Delta pumps are

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<sup>34</sup> DEIR, pp. 3-31, 3-47, 3-64.

<sup>35</sup> DEIR, p. 3-16, Table 3-2.

<sup>36</sup> DEIR, p. 3-58, lines 17-21.

<sup>37</sup> See, e.g., DEIR, p. 3-133.

<sup>38</sup> DEIR, p. 3-147, lines 26-28.

constrained, as demonstrated in the comments of SCWA, then it is reasonable to assume the Project will increase the number of transfers.

#### IV. ALTERNATIVES

It is a fundamental policy of CEQA that, as part of reducing a project's environmental impacts, an EIR must identify a reasonable range of alternatives and mitigation measures that could avoid or substantially lessen the project's significant impacts.<sup>39</sup> This discussion of alternatives and mitigation measures, which allows the public and decision makers to evaluate the ways in which a project might achieve its objectives while avoiding some of its impacts, has been called "the core of an EIR."<sup>40</sup>

In considering alternatives to a proposed project, a lead agency must first identify potential alternatives that satisfy threshold criteria, including whether an alternative could substantially reduce significant impacts while attaining most project objectives. An EIR must include an evaluation of the alternatives it considered and those it eliminated, including "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project."<sup>41</sup> Included should be a discussion of the rationale used in selecting alternatives, as well as an explanation of why other alternatives were rejected as infeasible.<sup>42</sup> Courts have rejected as inadequate EIRs that failed to consider alternatives which would reduce project impacts.<sup>43</sup> A lead agency should not adopt artificially narrow project objectives that would preclude consideration of reasonable alternatives for achieving the project's underlying purpose.<sup>44</sup>

In *Cleveland Nat'l Forest*, the adequacy of an EIR prepared for a regional transportation plan was challenged on grounds that it had failed to discuss a reasonable range of alternatives to the proposed project. Petitioners contended, and the court agreed, that the EIR analyzed only alternatives that represented slightly modified iterations of the proposed project, and none that were capable of significantly reducing vehicle miles traveled.<sup>45</sup> The court found this omission "inexplicable given [the lead agency's] acknowledgment in its Climate Action Strategy that the state's efforts to reduce greenhouse gas emissions from onroad transportation will not succeed if the amount of driving, or vehicle miles traveled, is not significantly reduced."<sup>46</sup> Similarly, here, the Delta Plan includes Policy WR P1 which calls for reduced reliance on the Delta through improved regional water self-reliance.<sup>47</sup> The Project, however, increases, rather than reduces, reliance on the Delta as a water source, including as a result of the massive investment (\$16 billion or more) that will be charged to SWP

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<sup>39</sup> Pub. Resources Code §§ 21002, 21002.1(a), 21100(b)(4), 21150.

<sup>40</sup> *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

<sup>41</sup> 14 Cal. Code Regs. § 15126.6(d).

<sup>42</sup> 14 Cal. Code Regs. § 15126.6(c).

<sup>43</sup> See *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 436–437 (transportation plan EIR that failed to consider alternatives that would reduce vehicle miles traveled found inadequate, particularly in light of Climate Action Strategy acknowledgement that reduction in vehicle miles traveled was imperative to reaching greenhouse gas emissions goals); *Watsonville Pilots Assn. v. City of Watsonville* (2006) 183 Cal.App.4th 1059, 1089–1090 (general plan EIR violated CEQA because it failed to consider reduced-development alternative that would significantly reduce project impacts even though the alternative would not meet all of the project's objectives).

<sup>44</sup> *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 203 (EIR for expansion of groundwater extraction failed to consider water conservation as alternative to increased groundwater extraction).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Delta Plan, Ch. 3, p. 122.

customers regardless of the amount of water that will be delivered as a result of the Project<sup>48</sup>; it is reasonable to assume those customers will expect and demand that Sacramento River water deliveries be maximized in return for these massive additional binding financial obligations. None of the alternatives proposed in the DEIR include actions that could serve to reduce reliance on the Delta or improve regional water self-reliance. The DEIR, in fact, specifically rejected alternatives that proposed reducing reliance on exports of Delta water as “antithetical to the water supply reliability criteria” without considering that such proposals sought to increase the reliability of existing water sources in other ways, such as levee improvement and maintenance.<sup>49</sup>

Though CEQA does not require that alternatives lessen or mitigate every environmental impact anticipated by the proposed project, they must be environmentally superior in some way.<sup>50</sup> Because the purpose of CEQA’s environmental review process is to identify ways to reduce adverse impacts resulting from proposed projects, an EIR’s discussion of alternatives must “focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.”<sup>51</sup> If an EIR concludes that no environmentally superior alternatives are available, it must support its conclusion with enough facts and analysis to allow decision makers to evaluate whether that conclusion is correct.<sup>52</sup> “Since the purpose of an alternatives analysis is to allow the decision maker to determine whether there is an environmentally superior alternative that will meet most of the project’s objectives, the key to the selection of the range of alternatives is to identify alternatives that meet most of the project’s objectives but have a reduced level of environmental impacts.”<sup>53</sup>

The 2020 Notice of Preparation (NOP) for the DEIR identified the proposed project as a “6,000 cubic feet per second (cfs) diversion capacity alternative, which was proposed to be located on either a central or eastern alignment from intakes in the north Delta to pumping facilities in the south Delta near Clifton Court Forebay.”<sup>54</sup> DWR asserts that it considered alternatives suggested during the current DEIR scoping period “by interested parties and technical experts and during past planning efforts (including the Bay Delta Conservation Plan and California WaterFix).”<sup>55</sup> Twenty-one potential alternatives were identified, and were screened through a “two-level filtering process,” during which alternatives were assessed first for whether they would meet the project’s purpose and objectives, and then evaluated for whether they tended to lessen the environmental impacts of the proposed project.<sup>56</sup> Eleven alternatives were eliminated during the first phase of the filtering process for their failure to meet at least two of the four criteria of climate resiliency, seismic resiliency, water supply reliability, and operational resiliency.<sup>57</sup>

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<sup>48</sup> DWR already has approved the issuance and imposition of this massive debt, through bond resolutions that it presently, and improperly, is seeking to validate in Sacramento County Superior Court. (See *California Department of Water Resources v. All Persons Interested in the Matter of the Authorization of Delta Program Revenue Bonds, etc.*, Sacramento County Superior Court Case No. 34-2020-00283112.)

<sup>49</sup> DEIR, Appendix 3A, p. 3A-34.

<sup>50</sup> 14 Cal. Code Regs., § 15126.6(b).

<sup>51</sup> 14 Cal. Code Regs., § 15126.6(b).

<sup>52</sup> *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305.

<sup>53</sup> *Watsonville Pilots Assn. v. City of Watsonville* (2006) 183 Cal.App.4th 1059, 1089.

<sup>54</sup> DEIR, p. ES-12.

<sup>55</sup> DEIR, p. ES-12.

<sup>56</sup> DEIR, p. ES-12; Project Description, p. 3-5; Appendix 3A, p. 3A-1 et seq.

<sup>57</sup> DEIR, Appendix 3A, pp. 3A-27–3A-30.

The DEIR’s evaluation and winnowing of alternatives under this first filter fails for several reasons, most notably because its conclusions were unsupported by substantial evidence and it employed an improperly narrow analysis designed, it seems, to eliminate any alternative that did not feature north Delta intakes and an around-Delta tunnel conveyance. Some of those alternatives rejected by Filter 1, however, would have ultimately met the Project’s objectives while also reducing Project impacts—a benefit not one of the alternatives ultimately selected can offer.

Ensuring that Filter 1 would eliminate any choices that deviated from the DCP North Delta intake and tunnel concept required application of an even narrower interpretation of consistency with Filter 1’s four criteria. In some cases, this appeared to involve simply tailoring the analysis of an alternative or Project objectives to result in selection of DCP-concept alternatives and rejection of choices that offered a more diverse water supply and conveyance system. In considering alternatives for their tendency to provide “operational resiliency,” for example, the DEIR narrowly identified only dual-conveyance systems with north Delta diversion intakes as possessing that resiliency.<sup>58</sup> Alternatives that suggested a range of approaches to meet Project objectives, or those that favored a through-Delta conveyance, or those that advocated for a more comprehensive list of intake locations, were rejected for their lack of “operational flexibility,” without explanation of how they allegedly failed to satisfy this objective.

The DEIR similarly rejected alternatives specifically designed to add diversity to the Project’s goal of water supply reliability, such as the portfolio-based approach and Congressman Garamendi’s Water Plan for All California, both of which proposed a divergent range of water supply measures such as a tunnel conveyance, increased water storage capacity, increased water recycling and conservation, and improvements to levees. DWR rejected both alternatives, though Table 3A-2 includes only an explanation for rejecting the portfolio approach, which was purportedly eliminated for its “specific goal of reducing SWP exports, which is antithetical to the water supply reliability criteria (i.e., restoring and protecting the ability of the SWP to deliver water).”<sup>59</sup> Even more baffling, the suggestion of levee improvements to increase water supply and seismic reliability—two of Filter 1’s four criteria, both of which were arguably met by both the portfolio and Garamendi proposals—was rejected because “these actions would require extensive construction and result in substantial environmental impacts.”<sup>60</sup> Exactly how levee improvement and maintenance would require more construction or result in more environmental impacts than a 45-mile tunnel buried 100 feet below ground with countless ancillary facilities that would displace thousands of Delta residents and take nearly 15 years to construct is conspicuously omitted from the DEIR. Notably those alternatives were capable of avoiding the Project’s numerous long-term and permanent impacts to historic Delta legacy communities, making DWR’s decision not to evaluate them in the DEIR even more troubling.

In sum, several different scenarios that were eliminated during the DEIR’s Filter 1 screening, including all those mentioned above, would likely offer far more flexibility and/or reliability than the proposed Project or alternatives. The DEIR’s screening under Filter 1, therefore, was inadequate and reduced the field of alternatives to an unreasonably narrow range, even before Filter 2 was applied.

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<sup>58</sup> DEIR, Appendix 3A, p. 3A-30, lines 3-5.

<sup>59</sup> DEIR, Appendix 3A, p. 3A-34.

<sup>60</sup> *Id.*



Of the remaining alternatives, “[o]nly the dual conveyance Bethany Reservoir alignment passed Filter 2 screening for its potential to avoid or reduce impacts compared to the proposed project.”<sup>61</sup> The remaining alternatives analyzed throughout the entire DEIR, therefore, do not satisfy CEQA’s requirement that the alternatives considered must be ones that offer substantial environmental advantages over the proposed project.<sup>62</sup> Alternative 5 was thus redefined as the Proposed Project<sup>63</sup> and the rest of the tunnel concepts are labeled project alternatives. This does not satisfy CEQA’s requirement that alternatives considered in an EIR must offer substantial environmental advantages over the proposed project.<sup>64</sup> While CEQA mandates that alternatives to a proposed project mitigate or reduce at least some of the project’s environmental impacts, none of the alternatives considered in the DEIR have the potential to reduce any impacts caused by the proposed Project. As DWR readily acknowledges, the proposed Project, Alternative 5, is in fact the only tunnel concept that reduces or avoids any impacts anticipated by the project identified by the NOP. The DEIR, therefore, offers no alternative with the potential to reduce impacts—and therefore no alternatives analysis at all that comports with CEQA—since Alternative 5 is identified as the proposed Project and no longer considered an alternative for the purposes of CEQA.

The DEIR offers an unreasonably narrow range of alternatives, which consist of slight variations in tunnel alignments and diversion amounts ranging from 3,000 cfs to 7,500 cfs, as well as three options for intake locations, from which two will be chosen. In fact, the DEIR does not offer a range of alternatives at all, but rather one concept—tunnel diversion from intakes in the north Delta to pumping facilities in the south Delta—with slight variations in alignment and capacity, and all of the EIR alternatives apart from Alternative 5 would have *greater* impacts than the proposed project (by, for example, building an additional intake and diverting 25 percent more water than the proposed project). Despite the Project’s devastating impacts to the Delta communities of Hood, Locke, Courtland and Clarksburg, the DEIR proposes no alternative intake locations, apart from the three proposed in and around these north Delta communities. It appears to Sacramento County that such potentially feasible alternatives exist. A review of information in the Fish Facilities Technical Team (FFTT) report<sup>65</sup> developed for the BDCP, which was conducted at the time BDCP was in development, indicates that there are at least two suitable intake locations farther downstream below Steamboat Slough which would reduce impacts to the Delta historic towns and their residents, as well as the potential for conflicts with upstream Delta land uses (including the Sacramento Regional Wastewater Treatment Plant and Freeport Regional Water Project) and operations and have the benefit of being better for salmon. At that time, an agreement between the FFTT and the project proponent assured that the EIR prepared for the BDCP would include a full analysis of the two intakes (intakes 6 and 7 in that project) south of Steamboat Slough:

Regarding intake locations, the goal and default assumption is that the project will determine the location of all intakes (for both Phase 1 and possible Phase 2) no later than the Final EIS. For now, intakes 6 and 7 will receive full analysis for biological effects, and conceptually be included in one or more alternatives over 6,000 cfs capacity in the DEIS. If analysis shows

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<sup>61</sup> DEIR, p. ES-12.

<sup>62</sup> Pub. Resources Code, § 21002; Cal. Code Regs., § 15126.6(a)–(b); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.

<sup>63</sup> DEIR, p. 3-6, lines 28-29.

<sup>64</sup> Pub. Resources Code, § 21002; Cal. Code Regs., § 15126.6(a)–(b); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.

<sup>65</sup> See FFTT Technical Memorandum, July 2011 (attached herein as “Exhibit A”).

these intakes locations are expected to provide benefits to covered aquatic species, then they would advance into one or more of the alternatives in the draft EIS/EIR, for further review prior to the final EIS/EIR. At the final EIS/EIR stage, the applicants and lead NEPA/CEQA agencies would make the determination as to whether to include intakes 6 and/or 7 as one or two of the five proposed intake locations, exclude them from further consideration, or maintain them in the analysis as “alternative locations” to be selected through adaptive management during the initial design study period or following completion of phase 1 of the project (i.e. all 7 locations would be fully described in the document, and the final determination would be made after phase 1 results are analyzed).<sup>66</sup>

The DEIR asserts that the Delta Conveyance Design and Construction Authority (DCA) “reviewed and reconsidered the previously considered intake site locations again in 2019 and reexamined the reach of the Sacramento River between Freeport and the confluence with Sutter Slough for other viable intake sites.”<sup>67</sup> The DCA evidently rejected these sites, but the DEIR provides no details of this analysis apart from a conclusory statement and a vague reference to a DCA engineering report appendix for readers seeking a more detailed explanation.<sup>68</sup> The significant purportedly unavoidable impacts of the proposed intakes pose an existential threat to the historic Delta communities of Hood, Courtland, Clarksburg, and Locke, and thus the decision of how those locations were selected is a matter of substantial public concern. The DEIR fails as an informational document not only in neglecting to meaningfully evaluate alternative intake locations that would avoid these impacts, but also in its failure to even disclose the basis for its rejection of such alternatives, so Delta residents could understand the decisionmaking process that led to a proposing a project that would destroy their communities.

Furthermore, the DCA’s analysis evidently failed, without reason, to consider the two intake sites further south which were part of a binding agreement in place at the time of the BDCP. There is also no rationale provided for limiting the range of potential intake locations to the reach between Freeport and the confluence with Sutter Slough, when intakes further south might also be feasible and further reduce or avoid the proposed project’s significant unavoidable impacts to Delta communities and the environment. Given the interest and concern of Delta residents living in and around the proposed intake locations in the Project’s ruinous effect on their communities, it is inexplicable why DWR did not provide meaningful information in the DEIR itself to inform the public about the basis for rejecting alternative intake locations.

The DEIR relies on siting information and criteria that is more than a decade old, and provides no information or analysis to demonstrate the intake siting considerations are still relevant given changing conditions in the Delta, nor does that analysis appear to have evaluated all viable locations anyway. No analysis supports a conclusion that alternative intake locations are not feasible, or that other locations may even be preferable in light of the DEIR’s stated objective to improve aquatic conditions in the Delta and reduce regulatory risks. Decisions that may have prioritized protection of Delta smelt over other protected species (e.g., salmon) may be less relevant now that smelt trawl surveys regularly find zero Delta smelt.<sup>69</sup> This has

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<sup>66</sup> BDCP Phased Construction FTTT Report, October 12, 2011, p. 16 (attached herein as “Exhibit B”).

<sup>67</sup> DEIR, Appendix 3A, p. 3A-4, lines 27-30.

<sup>68</sup> *Id.*, at lines 41-42.

<sup>69</sup> No Delta smelt were found in the annual September midwater trawl survey in 2021, marking four years in a row with no smelt found in the September survey. California Department of Fish and Wildlife, Monthly Abundance Index for Delta Smelt, October 2021, at <https://www.dfg.ca.gov/delta/data/fmwt/indices.asp>. For the sixth November in a row, no smelt were found in the 2022



caused some scientists to assert that Delta smelt may disappear from the wild in 2021 or 2022.<sup>70</sup> Based on these changed conditions, intake locations that are more beneficial for salmon should be prioritized and considered.

The DEIR further asserts that it omitted from consideration intake locations in the western Delta due to the potential for higher salinity in western Delta waters. However, the DEIR elsewhere assures readers that the new intakes will divert Delta water only when flows are high. During high flows, freshwater would be present at locations further west in the Delta, as salinity is diluted from freshwater sources coming from the north and east, thus negating the need for intakes at locations further north. This also fails to consider the viability of brackish water desalination, of some or all of the project diversion, as is being implemented for the City of Antioch.

What's more, the rejection of all proposed alternatives that had the tendency to reduce impacts to communities in the Delta demonstrates that DWR continue to favor and prioritize the desires of water exporters south of the Delta at the expense of in-Delta users. While the DEIR insists that the SWP would continue to prioritize the south Delta export facilities over the new north Delta intakes, which would be used only to "augment" the south Delta operations to "capture additional excess flows when the south Delta exports are limited" and when needed to meet State Water Board salinity requirements,<sup>71</sup> a reasoned analysis of the DEIR casts serious doubt on this assertion. Despite the massive investment of time and money into the new north Delta intakes and tunnel conveyance, this occasional use appears to result in only modest improvements to salinity levels of Delta exports,<sup>72</sup> reinforcing the idea that other potentially feasible alternatives, such as brackish water desalination with levee improvements, would be equally or more capable of meeting project objectives. The Project, with its monumental price tag—estimated at \$16 billion<sup>73</sup> but generally expected to surpass \$20 billion or more—and alleged modest improvements in water quality, appears to be of limited value to those who will purportedly fund it, the south-of-Delta exporters. It is reasonably foreseeable that pressure from these exporters will cause DWR to abandon its south Delta facilities in favor of fresher exports from the north intakes.<sup>74</sup> The Project, therefore, will not operate as insisted in the DEIR, which assumes that south Delta diversion will be prioritized and north intakes used only as needed. As exports increasingly leave from the north intakes and less water flows through the Delta, the County's concerns about water quality degradation are likely to be confirmed.

Given that potential impacts to residents and businesses in the Delta would result from all iterations of the tunnel concept considered in the DEIR, a reasonable range of alternatives, as required by CEQA, would

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CDFW Fall Midwater Trawl Survey of the Sacramento-San Joaquin River Delta, either. See <https://www.dailykos.com/stories/2022/12/8/2140750/-As-Delta-Tunnel-plans-move-forward-CDFW-midwater-trawl-survey-reports-zero-Delta-smelt-in-November>.

<sup>70</sup> Peter Moyle et al., "2021: Is This the Year That Wild Delta Smelt Become Extinct?," California Water Blog, press release, January 10, 2021, at <https://californiawaterblog.com/2021/01/10/2021-is-this-the-year-that-wild-delta-smeltbecome-extinct/>.

<sup>71</sup> DEIR, p. 3-145, lines 31-32; p. 3-146, lines 1-2.

<sup>72</sup> LA County Sanitation Districts Comment Letter on the DEIR, November 28, 2022, p. 2.

<sup>73</sup> Delta Conveyance Design and Construction Authority. <https://water.ca.gov/News/Blog/2021/February/How-is-the-Delta-Conveyance-Project-Financed>

<sup>74</sup> Already, south-of-Delta interests have begun to apply this pressure: The Los Angeles County Sanitation Districts, troubled by the projected modest improvements to salinity in export deliveries reported in the DEIR, urged DWR to implement an operations strategy that would control salinity "to the maximum extent practical." LA County Sanitation Districts Comment Letter on the DEIR, November 28, 2022, p. 2.

include alternative intake locations and conveyance scenarios, as well as impact-reducing measures such as levee improvement, increased water storage, recycling, and conservation, and desalination options. The DEIR features several slightly modified versions of just one project concept, none of which would reduce environmental impacts. This impermissibly narrow range of alternatives suggests to the public that no environmentally superior options exist and that decision makers must choose a variation on this one theme in order to meet Project objectives at all. This is simply not true, and does not relieve DWR of the duty imposed by CEQA to identify and consider a truly diverse range of alternatives. The DEIR must be revised to include and present to the public for its input a range of alternatives that can be independently evaluated.

## **V. THE DEIR/EIS FAILS TO PROVIDE AN ACCURATE AND OBJECTIVE ASSESSMENT OF THE PROJECT'S IMPACTS**

The DEIR improperly defers numerous studies and investigations necessary to fully analyze potential Project impacts until after the CEQA process is complete, including:

- An investigation into the seismic risk posed by the West Tracy Fault
- A Phase I Environmental Site Assessment to identify current conditions such as hazards present in soils
- Field investigations to identify potential for land subsidence at proposed facility locations
- Investigations of geotechnical and hydrogeologic sampling to identify appropriate construction methodologies

“While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA’s demand for meaningful information ‘is not satisfied by simply stating information will be provided in the future.’”<sup>75</sup> Notably, the DEIR is not a programmatic EIR subject to the tiering provisions of CEQA. It is a project-specific EIR, and as such, must include sufficient detail regarding its potential impacts, both near-term and long-term.<sup>76</sup> While a lead agency is not required to “foresee the unforeseeable,” it “must use its best efforts to find out and disclose all that it reasonably can.”<sup>77</sup> The DEIR’s deferment of studies and analyses essential to an effective evaluation of Project impacts violates these directives.

Like the County, the DISB found that the DEIR lacks key information necessary to support informed decision making, such as a clear depiction of how the Project will achieve its claimed benefits, evidence to support many of its findings that impacts will be less than significant, and explanations of predictions regarding future climate effects and how mitigation measures will achieve their purported degree of effectiveness in reducing Project impacts.

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<sup>75</sup> *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.

<sup>76</sup> 14 Cal. Code Regs., § 15151.

<sup>77</sup> 14 Cal. Code Regs., § 15144.

A DEIR must be recirculated when it is “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.”<sup>78</sup> The DEIR is neither accurate nor objective. It is replete with critical errors and omissions and repeatedly overstates positive outcomes and downplays the Project’s negative effects. The net result is a document that appears tainted by a pro-project bias and thus does nothing to demonstrate to an apprehensive public that the public agencies promoting the Project have objectively and meaningfully considered the Project’s environmental impacts. The DEIR’s failure to provide adequate, balanced scientific analyses, and use of incorrect, biased data, which resulted in unfounded conclusions, has deprived the public and decisionmakers of significant information about the relative merits of the Project, and its potential environmental outcomes.

## **VI. THE PROJECT CANNOT DEMONSTRATE CONSISTENCY WITH APPLICABLE REGIONAL PLANS**

An EIR must discuss any inconsistencies between the proposed project and applicable local or regional plans.<sup>79</sup> Regional plans that may apply to a project include air quality attainment or maintenance plans, areawide waste treatment and water quality plans, regional transportation plans, greenhouse gas reduction plans, habitat conservation plans, natural community conservation plans, and regional land use plans. A project is inconsistent with a plan if a “reasonable person” could not have found the project to be consistent.<sup>80</sup>

### **A. The Project is Not Consistent with the Delta Plan**

The Delta Reform Act of 2009 established two coequal goals: (1) securing a reliable water supply for California, and (2) protecting, restoring, and enhancing the Sacramento-San Joaquin Delta ecosystem and the fish, wildlife, and recreation it supports. The Act recognized the Delta as an “evolving” environment and outlined a state policy of reduced reliance on Delta water exports, opting for a strategy of improved conservation, the development and enhancement of regional supplies, and water use efficiency.

Adopted in 2013 under the authority of the Act, the Delta Plan set forth 14 regulatory policies and 73 non-regulatory recommendations that contribute to the achievement of the coequal goals, including reduced reliance on Delta exports; enhanced water quality standards; protection of the Delta’s unique ecosystem; mitigation of the multiple stressors affecting the Delta; improvement of emergency preparedness throughout the Delta region; reduction of flood risk; and prioritization of state investment in levee maintenance and upgrades. The Delta Plan contains policies, recommendations, and performance measures designed to protect the Delta environment and existing Delta land uses from the impacts of major new projects, including the proposed Delta Conveyance Project. The Delta Plan also contains priority recommendations that identify actions “essential to achieving the coequal goals”<sup>81</sup> and performance measures related to meeting the Plan goals and policies.<sup>82</sup> The Delta Reform Act requires that projects within the boundaries of the Delta that will

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<sup>78</sup> 14 Cal. Code Regs., § 15088.5, subd. (a)(4).

<sup>79</sup> 14 Cal. Code Regs., § 15125(d).

<sup>80</sup> CEB *Practice Under the California Environmental Quality Act*, 2nd Ed., § 12.33.

<sup>81</sup> Delta Plan, p. ES-17.

<sup>82</sup> Delta Plan, Appendix E: Performance Measures for the Delta Plan, as amended Apr. 26, 2018.

significantly impact the achievement of the coequal goals demonstrate consistency with the Act and each of the Plan's regulatory polices before the project may be implemented.<sup>83</sup>

The DEIR asserts that the "Delta Conveyance Project is consistent with and furthers the achievement of the coequal goals by providing the water supply resilience needed to address seismic risks, sea level rise, and other reasonably foreseeable consequences of climate change and extreme weather events."<sup>84</sup> The Project's stated purpose and objectives, however, do not commit the Project to improve or even maintain current conditions for the Delta's imperiled fisheries, nor do they ensure that the Project will attempt to protect, restore, and enhance the Delta ecosystem. Instead, the Project's objectives promise to seek "operational flexibility" and to maximize Delta exports in the face of threats from climate change and seismic events. The DEIR explains this by stating that "[a]lthough the Delta Conveyance Project is not required to achieve the coequal goals, it will have a substantial positive impact on achievement of the coequal goals in a manner consistent with state policy."<sup>85</sup>

The DEIR fails to explain, however, how the Project will have a "substantial positive impact on the achievement of the coequal goals." Degrading water quality in the Delta, regardless of the extent of any adverse impacts, does not improve aquatic conditions. Improving water supply reliability for exports out of the Delta, meanwhile, at the expense of water quality and related conditions in the Delta, including species dependent on the Delta ecosystem, does not preserve existing conditions in the Delta, let alone protect, restore, or enhance them.

In fact, even the Project's benefits claimed by the DEIR do not appear reasonably foreseeable and are not adequately supported by substantial evidence. The DISB commented that the DEIR "lacks clear and compelling evidence of how the proposed project operationally meets the beneficial objectives of improving water supply reliability y across diverse water years, while minimizing the projects impacts and the risks from sea level rise, earthquakes, and levee breaches, in comparison to a future without the project."<sup>86</sup> The DISB found equally dubious the claim made in the DEIR that the Project will have a less-than-significant impact on fish species, aquatic ecosystems and riparian habitat. The Project's reduction in river flows of 30 percent or more would be expected to have detrimental effects on these systems, and the DEIR does not provide adequate evidence that the listed mitigation measures will be effective at reducing these impacts.

### **1. The Project is not Consistent with the Delta Plan Policy to Reduce Reliance on the Delta**

Delta Plan Policy WR P1, Reduce Reliance on the Delta through Improved Regional Water Self-Reliance, states, among other things, that "water shall not be exported from, transferred through, or used in the Delta if: . . . (3) The export, transfer or use would have a significant adverse environmental impact in the Delta."<sup>87</sup> The Project not only increases reliance on the Delta, through the expenditure of massive amounts of public funds and construction of permanent facilities dedicated to increasing the frequency and reliability of Delta diversions, but it also will result in numerous significant unavoidable permanent environmental impacts. Moreover, given the scale of known adverse effects (and not even accounting for the many unevaluated and

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<sup>83</sup> Wat. Code, §§ 85054, 85057.5, 85225; Cal. Code Regs., tit. 23, § 5002, subd. (b)(1).

<sup>84</sup> DEIR, Appendix 3E, p. 3E-5, lines 1-4.

<sup>85</sup> DEIR, Appendix 3E, p. 3E-5, lines 4-6.

<sup>86</sup> DISB, public meeting comments, December 8, 2022, draft DEIR comments, p. 7.

<sup>87</sup> Delta Plan, as amended in 2019, p. ES-18.

likely substantial adverse effects), including but not limited to impacts to fish and water quality, there is no credible basis for finding that the Project furthers the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem.” In this way the Project is inconsistent with Delta Plan Policy WR P1.

## **2. The Project is not Consistent with the Delta Plan Policy to Respect Local Land Use**

Delta Plan Policy DP P2, Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats, requires that water management facilities respect local land use and be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans.<sup>88</sup> The proposed diversion facilities and associated infrastructure fail to respect local land use and will conflict with and irreparably damage the existing Delta communities of Hood, Clarksburg and Courtland by permanently altering the physical landscape, including agricultural and cultural/historic uses, substantially degrading its unique scenic qualities and cultural/historical and economic values in perpetuity. In this way the Project is fundamentally inconsistent with Delta Plan Policy DP P2.

## **3. The Project is not Consistent with the Delta Plan’s Requirement that Covered Actions Employ the Best Available Science**

As part of its requirement that covered actions must make detailed findings to establish consistency with the Delta Plan, Policy G P1 requires that “all covered actions must document use of best available science.”<sup>89</sup> The DEIR failed to use the best available science in several of its impact analyses, including in its predictions of future scenarios under climate change by applying only an extreme and unlikely sea level rise against which to measure Project impacts. Its analyses of impacts to species using a species-by-species approach, rather than examining Project effects on species interactions or ecosystem productivity, do not apply the best available science. As noted by the DISB, aquatic ecosystem effects on a community scale would provide a more accurate depiction of Project impacts. The DEIR’s omission of scientific uncertainty in several of its assessments, furthermore, results in skewed conclusions and underestimated impacts. The DEIR does not demonstrate consistency with the Delta Plan Policy to document use of best available science.

## **VII. THE DEIR’S USE OF IMPROPER BASELINES, METHODOLOGIES, AND SIGNIFICANCE THRESHOLDS RESULTS IN INACCURATE CONCLUSIONS REGARDING PROJECT IMPACTS AND MITIGATION**

An EIR must identify and describe direct and indirect project impacts with a “sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.”<sup>90</sup> Courts have found a “good faith effort at full disclosure” is necessary to inform the critical discussion of mitigation measures and project alternatives at the core of the EIR.<sup>91</sup> A description of an environmental impact that is insufficient “because it lacks analysis or omits the magnitude of the impact” renders an EIR inadequate as an informational document.<sup>92</sup>

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<sup>88</sup> Delta Plan, as amended in 2019, p. ES-38.

<sup>89</sup> Delta Plan, as amended in 2019, p. ES-17.

<sup>90</sup> 14 Cal. Code Regs., § 15151.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 514.



The DEIR’s analyses of Project impacts do not meet these standards, starting with its evaluation of existing environmental conditions. Use of improper methodology, failure to support conclusions with substantial evidence and analysis, and a tendency to mask or underestimate impacts by applying erroneous thresholds of significance all render the DEIR insufficient and inadequate as an informational document. As a result, the County is unable to understand the full scope of potential Project impacts relevant to its citizens, communities, and the environment. Impacts to water quality and supply, flood protection and management, public health, agriculture, County facilities such as roads and other infrastructure, cultural resources, and habitat critical to aquatic and terrestrial species are insufficiently or inaccurately analyzed in the DEIR, and mitigation measures thus fail to address the extent of potential impacts. Many of these impacts will have significant adverse effects on the County’s residents, businesses, operations, facilities and programs, and as such, must be properly evaluated using accurate data and methods and recirculated in a revised DEIR for public comment.

#### **A. The Use of Unreasonable Future Baseline Conditions Masks Project Impacts**

The DEIR must describe the environmental setting for the project, which is made up of “the physical environmental conditions in the vicinity of the project” as viewed from “a local and regional perspective.”<sup>93</sup> Use of the proper baseline is critical to a meaningful assessment of a project’s impacts. Though the environmental setting usually describes conditions as they exist at the time of the notice of preparation or when environmental analysis begins, an EIR should employ a realistic baseline. When existing conditions change or fluctuate over time, the lead agency may define existing conditions by taking account of historic conditions or conditions expected when the project becomes operational.<sup>94</sup> Whether intended to reflect existing or future conditions, the baseline must be supported by substantial evidence, which CEQA defines as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”<sup>95</sup> “Argument, speculation, opinion or narrative, evidence which is clearly erroneous or inaccurate . . . “does not constitute substantial evidence.”<sup>96</sup> Substantial evidence “shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by fact.”<sup>97</sup>

The DEIR used as a baseline the typical environmental setting, describing conditions as they existed at the time the NOP was prepared, in January 2020. However, also included were comparisons of conditions as they would be expected to be in 2040 for analysis of the No Project Alternative, as well as analysis of Project impacts in 2040, when the Project is expected to be operational, to reflect conditions after climate change and sea level rise have been accounted for.<sup>98</sup> The future conditions evaluated, however, apply only extreme climate change conditions, such as sea level rise of 1.8 feet by 2040, or 10.2 feet by 2100. Use of these drastic—some would say exaggerated—scenarios does not merely serve to give readers a glimpse of possible future conditions; by analyzing potential Project impacts against extreme conditions representing the outer limit of future climate projections, the severity of Project impacts is masked by the comparison to a more moderate climate change estimate. A sea level rise of 0.5-0.8 feet by 2040 will have a 66 percent probability, according

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<sup>93</sup> 14 Cal. Code Regs., § 15125(a).

<sup>94</sup> 14 Cal. Code Regs., § 15125(a)(1).

<sup>95</sup> 14 Cal. Code Regs., § 15384(a).

<sup>96</sup> *Ibid.*

<sup>97</sup> 14 Cal. Code Regs., § 15384(b).

<sup>98</sup> DEIR, p. 4-5, lines 28-36.

to the California Ocean Protection Council's Sea Level Rise Guidance.<sup>99</sup> A rise of 1.3 feet by 2040 has a 0.5 percent probability, a 1-in-200 likelihood. The probability of a rise of 1.8 feet by 2040 is so low it is unquantifiable.<sup>100</sup> Use of this extremely unlikely future scenario, which requires speculation and unreasonable assumptions, cannot meet the definition of substantial evidence. It is not reasonable to assume that sea level rise will reach these extreme levels, and use of these unlikely conditions minimizes the Project's actual impacts on things like water quality, because Project-induced changes appear negligible against this inflated baseline. While the worst-case scenario can be assessed, the DEIR should also evaluate impacts against other, more realistic future scenarios. In the absence of such analysis, it appears the DEIR is purposefully utilizing these extreme scenarios merely to artificially minimize Project impacts.

The DEIR must be revised to use baseline conditions that will more accurately reflect potential Project impacts as they change over time, particularly since the Project will not be operational for over a decade. Impact analyses that depend on the Sacramento and San Joaquin River and Delta hydrologic conditions (including impacts to water quality, water supply and public facilities that discharge into or divert water from the Delta) must utilize a baseline that accurately reflects conditions at the time the Project is expected to begin operations, as well as reasonably foreseeable future conditions. Operational impacts to Delta water quality and operations at County facilities will occur immediately upon commencement of Project diversions and near-term impacts may be substantially different from those impacts occurring farther in the future, when background hydrologic conditions will be considerably different due to the effects of climate change. However, the use of only extreme, highly unlikely future conditions does not allow for evaluation of reasonably foreseeable Project impacts by the public and decision makers.

### **1. The Baseline Likely Will Need to be Revised to Reflect New Biological Opinions and Water Quality Control Plan Update and Voluntary Agreements**

In establishing the environmental setting from which to measure the Project's impacts, the DEIR strictly follows the general baseline rule under CEQA Guidelines section 15125, which is to say that it sets the baseline as of the date of release of the 2020 Notice of Preparation of EIR.<sup>101</sup> The DEIR also considers future 2040 and 2070 baselines in select analyses as well as in connection with the No Project Alternative.<sup>102</sup> The use of a 2020 baseline, however, will become increasingly unhelpful as expected changes in Delta water regulations come into effect in the near term.

The DEIR acknowledges that the United States Fish & Wildlife Service and National Marine Fisheries Service have reinitiated consultation under Section 7 of the U.S. Endangered Species Act, leading to the issuance of new biological opinions (BiOps) that will govern the coordinated operations of the SWP and CVP.<sup>103</sup> This process is well underway and will substantively revise the existing 2019 BiOps and corresponding restrictions on Delta diversions, pumping and exports. The DEIR does not speculate as to how the new BiOps may alter the rules governing SWP operations, but it is undeniable that the new BiOps will

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<sup>99</sup> State of California Sea-Level Rise Guidance (2018 update), available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.opc.ca.gov/webmaster/ftp/pdf/agenda\\_items/20180314/Item3\\_Exhibit-A OPC SLR\\_Guidance-rd3.pdf](https://efaidnbmnnnibpcajpcglclefindmkaj/https://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20180314/Item3_Exhibit-A OPC SLR_Guidance-rd3.pdf), p. 18.

<sup>100</sup> Exponent Comments on DCP DEIR for Regional San, December 16, 2022, p. 27.

<sup>101</sup> See DEIR, p. 4-4, lines 24-26.

<sup>102</sup> See DEIR, pp. 4-5, 4-6.

<sup>103</sup> DEIR, p. 1-21, lines 1-5.



change the environmental setting even before DCP construction begins, potentially rendering the current DEIR impacts analysis obsolete.

Similarly, the DEIR acknowledges that the State Water Resources Control Board (SWRCB) is in the process of updating the Sacramento-San Joaquin Bay Delta Water Quality Control Plan (WQCP) which, *inter alia*, provides for sufficient Delta outflows to prevent the upriver encroachment of salinity levels.<sup>104</sup> Presently, the SWRCB has proposed an “unimpaired flow standard” of 40% for the Lower San Joaquin River.<sup>105</sup> It has not yet announced a final unimpaired flow standard for the Sacramento River basin. The DEIR further acknowledges that the WQCP Update may be resolved through the adoption of Voluntary Agreements (VAs) among the Water Board and various California water purveyors. The DEIR even goes so far as to provide a cursory analysis using a blended baseline derived from the 2019 draft VAs and 2022 VA Memorandum of Understanding.<sup>106</sup> This bonus analysis, however, does not consider the implementation of an unimpaired flow standard (i.e., that the VAs may not come to fruition and the SWRCB unilaterally adopts the WQCP Update, imposing unimpaired flow standards on water users in all Delta tributaries.)

As with the new BiOps, the WQCP Update, whether it be implemented through the VAs or otherwise, will significantly alter the surface water regime in the Sacramento and San Joaquin River basins. This inevitable change will increasingly render the DEIR’s impacts analysis outdated and irrelevant. DWR’s strict adherence to a 2020 environmental setting will lead to a moot environmental impacts analysis. The new ESA BiOps and WQCP Update/VAs will constitute “significant new information” when they are available, either in final or preliminary form. DWR will be required to account for these changes to the environmental setting and recirculate the DEIR if this information becomes available prior to certification of the Final EIR.<sup>107</sup> Given the magnitude of these changes and the effect they may have on the DCP analysis, DWR should wait to complete and certify the EIR until after the new BiOps and WQCP Update/VAs have been adopted/approved.

## **B. Methodologies Used to Analyze Project Impacts are Flawed and Their Use is Not Supported by Substantial Evidence**

In evaluating Project impacts that will affect communities and stakeholders in Sacramento County, the DEIR must apply methodologies that will provide the most accurate assessment of the Project’s potential adverse effects. The DEIR’s analyses of impacts to flows and water quality do not present relevant information regarding predicted water quality changes. The Delta Simulation Model II (DSM2) simulates flows and water quality within the Delta using a 15-minute time step, which is necessary to capture tidally driven flows and water quality conditions within the Delta estuary.<sup>108</sup> Throughout the DEIR, however, changes to water quality and flows are discussed as long-term averages aggregated statistically. This long-term average data does not accurately or meaningfully disclose the Project’s effects.

Most entities with water discharge or diversion facilities within the Delta, including those operated by Sacramento County, operate facilities and manage treatment operations on short timeframes (e.g., hourly). Model results that are processed to show changes in terms of long-term averages, and then provided in

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<sup>104</sup> DEIR, p. 4C-1, lines 13-16.

<sup>105</sup> WQCP Update Phase I.

<sup>106</sup> See DEIR, Appendix 4C.

<sup>107</sup> See CEQA Guidelines, § 15088.5.

<sup>108</sup> *Ibid.*

summary statistical format, do not provide the information needed to assess the impacts of the proposed Project on their operations.<sup>109</sup> As explained in expert comments by Exponent submitted in support of Regional San’s DEIR comments, there is a feasible, more relevant methodology and means of evaluating and presenting Project-related impacts available that would provide meaningful information to the public and decisionmakers.

In revising the DEIR to include appropriate methodology that accurately reflects Project impacts, DWR should consult with Sacramento County and SCWA for input on both the appropriate methodology for impact assessment and to determine whether there are feasible means of avoiding impacts to County operations.

### **C. The Use of Improper Thresholds of Significance Disguises Significant Impacts as Less Than Significant**

A threshold of significance is defined by the CEQA Guidelines as “an identifiable quantitative, qualitative or performance level of a particular environmental effect.”<sup>110</sup> A lead agency has discretion to formulate standards of significance for use in an EIR. The choice of appropriate thresholds of significance must be “based to the extent possible on scientific and factual data” and requires an exercise of reasoned judgment founded on substantial evidence.<sup>111</sup> Compliance with thresholds of significance does not relieve a lead agency of the obligation to consider substantial evidence indicating that the project’s environmental effects may still be significant, and when there is evidence that an impact may be characterized as significant, an EIR may not adopt a contrary finding without providing an adequate explanation along with supporting evidence.<sup>112</sup> The agency “must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect.”<sup>113</sup>

The DEIR failed to meet CEQA’s standards for thresholds of significance in several impact analyses, including in its analyses of Project impacts to water quality, transportation, recreation, agriculture, aesthetics, and noise, discussed in section IX. below. In some instances, these thresholds appear to have been chosen arbitrarily and are unsupported by substantial evidence in the DEIR or its supporting documents, such as the DEIR’s analysis of noise impacts, which offers no justification for its chosen threshold of noise impacts. In others, however, they seem designed specifically to artificially reduce the appearance of the significance of Project impacts. For example, in devising water quality impact thresholds of significance based on the suggested questions found in CEQA Guidelines Appendix G, the DEIR states that its “refinements” to the Appendix G language “reflect the application of professional judgment and experience to the more general language found in the original.”<sup>114</sup> However, the thresholds appear in fact to be tailored to justify the DEIR’s conclusions regarding the Project impacts. The list of 8 thresholds includes the following 4, which define an impact as significant if the Project would:

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<sup>109</sup> Exponent Comments prepared for Regional San, p. 7.

<sup>110</sup> 14 Cal. Code Regs., § 15064.7(a).

<sup>111</sup> 14 Cal. Code Regs., § 15064(b)(1); *Cleveland Nat’l Forest Found. v. San Diego Ass’n of Gov’ts* (2017) 3 Cal.5th 497, 515; *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal.App.5th 160, 206.

<sup>112</sup> 14 Cal. Code Regs., § 15064(b)(2); *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 302.

<sup>113</sup> *Id.* at 1109.

<sup>114</sup> DEIR, p. 9-36, lines 11-13.

- 1) Cause exceedance of applicable state or federal numeric or narrative water quality objectives/criteria or other relevant water quality effects thresholds identified for this assessment from the scientific literature by frequency, magnitude, and geographic extent that would result in adverse effects on one or more beneficial uses of affected waterbodies.
- 2) Increase levels of a bioaccumulative pollutant by frequency, magnitude, and geographic extent such that the affected waterbody (or portion of a waterbody) would be expected to have measurably higher body burdens of the bioaccumulative pollutant in aquatic organisms that result in substantially increasing the health risks to wildlife (including fish) or humans consuming those organisms.
- 3) Cause long-term degradation of water quality in affected waterbodies that would result in substantially increased risk for adverse effects on one or more beneficial uses.
- 4) Further degrade water quality by measurable levels, on a long-term basis, for one or more parameters that is already impaired, and thus included on the State's CWA Section 303(d) list for the waterbody, such that beneficial use impairment would be made discernibly worse.<sup>115</sup>

These criteria add to pre-existing standards unnecessary conditions that artificially inflate the threshold, thereby making Project impacts appear less severe. Threshold 1, for example, attempts to add to water quality objectives already established by state and federal law—the exceedance of which is necessarily an adverse effect—the unnecessary burden of an analysis to determine whether adverse effects would occur. Threshold 2 adds the qualifiers “measurably higher” and “substantially increasing” to measures of bioaccumulative pollutant levels that, under the threshold’s own circular explanation, already exceed adopted fish tissue objectives. Measurable pollutant increases to these organisms would, by definition, substantially increase health risks. Threshold 3’s language, purporting to find significant impacts where degradation of water quality would cause “substantially increased risk for adverse effects on one or more beneficial uses” is decidedly vague and open to interpretation. The qualifier in Threshold 4 asserting that degradation of a 303(d)-listed waterbody would be significant if its “beneficial use impairment would be made discernibly worse” fails to consider that the Clean Water Act’s Section 303(d) list consists of impaired waterbodies that are already determined to be in violation of adopted water quality objectives. Any further degradation would be significant, and impacts that would result in “measurable” degradation would, by definition, be “discernible.”

While DWR has discretion to adopt thresholds of significance for the Project, it must support its decisions of which thresholds to apply with substantial evidence. And while the DEIR’s “refinements” to Appendix G’s checklist are supposedly intended to add specificity and “professional judgment” to the checklist’s general language, the DEIR offers no substantial evidence in support of its chosen thresholds. The DEIR offers no indication, for example, of why Appendix G’s suggestion that impacts would be significant if they would “violate *any* water quality standards or waste discharge requirements or otherwise substantially degrade surface or groundwater quality”<sup>116</sup> was changed to instead find significant only those impacts that violate a “waste discharge requirement *issued to the project for construction-related activities.*”<sup>117</sup> Any

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<sup>115</sup> DEIR, p. 9-36, lines 15-28.

<sup>116</sup> CEQA Guidelines, Appendix G, p. 7 (emphasis added).

<sup>117</sup> DEIR, Ch. 9, p. 9-36, line 38 (emphasis added).

evaluation of the significance of impacts to the region's various waste discharge facilities, including those owned or operated by the County, is thereby omitted from the DEIR's impact analysis.

The DEIR must be revised to provide substantial evidence for its chosen thresholds of significance, or in the absence of such evidence, further refine its thresholds to reflect true Project impacts.

### **VIII. THE DEIR'S TREATMENT OF MITIGATION MEASURES VIOLATES CEQA**

A fundamental purpose of CEQA is to require public agencies to avoid or reduce environmental damage when possible by requiring appropriate mitigation measures and through the consideration of environmentally superior alternatives.<sup>118</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>119</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>120</sup>

#### **A. The DEIR Improperly Incorporates Mitigation Measures into the Project Description**

"A 'mitigation measure' is a suggestion or change that would reduce or minimize significant adverse impacts on the environment caused by the project as proposed."<sup>121</sup> A mitigation measure is not part of the project.<sup>122</sup> To ensure that a project's potential environmental impacts are fully analyzed and disclosed, and that the adequacy of proposed mitigation measures is considered, mitigation measures that are not incorporated into the project's design should not be treated as part of the project description.<sup>123</sup> Mitigation measures that are mischaracterized as project components may obstruct or obscure project impacts, and should not be included in an initial analysis of a project's potential impacts. Such mischaracterization is a material error and a violation of CEQA.<sup>124</sup>

Characterizing the "environmental commitments" as part of the Project violates CEQA. In fact, the "environmental commitments" are designed to reduce or eliminate numerous project impacts, including significant impacts to water quality, soils, recreation, transportation, public health, fish and aquatic resources, and a host of other impact areas.<sup>125</sup> There is hardly a resource area for which environmental commitments were not claimed to be factored into the impact analysis. The DEIR claims that Project impact analyses "consider[] the ECs and BMPs as part of the project, and the discussion presents the level of impact of the project, first without implementation of the ECs and BMPs to determine the significance of the impact and then, as the ECs and BMPs are applied, whether the impact has been reduced to a less-than-significant level and whether additional mitigation is required."<sup>126</sup> The DEIR appears to misunderstand the role of mitigation as

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<sup>118</sup> CEQA Guidelines, § 15002(a)(2)-(3); see also, *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, 400.

<sup>119</sup> Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

<sup>120</sup> Pub. Resources Code, §§ 21002-21002.1.

<sup>121</sup> *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445.

<sup>122</sup> *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656.

<sup>123</sup> *Lotus v. Department of Transp.* (2014) 223 Cal.App.4th 645, 656.

<sup>124</sup> *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal.App.5th 160, 185.

<sup>125</sup> See, e.g., DEIR, Appendix 3B, pp. 3B-2 to 3B-4.

<sup>126</sup> DEIR, Appendix 3B, p. 3B-2, lines 4-7.

required by CEQA. Mitigation measures, which must be applied after a project's impacts have been evaluated so that the public can understand the full breadth of a project's potential impacts, must be binding to ensure that these measures will actually be implemented, not merely adopted and then ignored.<sup>127</sup> The DEIR, by characterizing its measures as "commitments," misleads the public because not only are they not set forth in the project description but there is no firm commitment that they be implemented.

Moreover, the DEIR ignores that, whether characterized as part of the project description or mitigation, burying the environmental commitments in an appendix subverts CEQA's informational mandate by denying the public the opportunity to review and understand them in the context of the DEIR analysis. Merely assuming their implementation will reduce impacts, without any analysis or evidence to support those assumptions, also prevents the public from understanding the full scope of the impact of the proposed actions or commenting on the effectiveness of the environmental commitments as mitigation.

In order for the public to understand the full scope of the Project's impacts, the DEIR must be revised to clearly describe the environmental commitments in the context of the individual impact analyses, and explain exactly how and to what degree they are expected to reduce project impacts. Impacts must be measured and quantified without consideration of the environmental commitments before any determination is made regarding their effect. This analysis and supporting evidence must be included in the body of the DEIR, and the document must be recirculated for public review and comment.

## **B. Mitigation is Improperly Deferred, is Ineffective, and Unenforceable, all in Violation of CEQA**

Mitigation measures must be clearly effective in reducing impacts to a less-than-significant level.<sup>128</sup> Mitigation measures that require development of a mitigation plan based on future studies are legally inadequate if they do not describe the anticipated management actions and do not include management guidelines or performance standards which describe levels of reduction in impact significance that must be achieved in order for impacts to be fully and effectively mitigated.<sup>129</sup> Impermissible deferral of mitigation, in which an agency "simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report," are inadequate and a violation of CEQA.<sup>130</sup> Mitigation measures that are so undefined that it is impossible to assess their effectiveness are legally inadequate.

The majority of the DEIR's measures aimed at reducing or avoiding significant Project impacts are of unproven efficacy or are entirely unenforceable, rendering the DEIR's conclusions that impacts are reduced to acceptable levels unacceptable. Its proposed mitigation of impacts to noise, recreation, agriculture, transportation, water quality, groundwater, geology and seismicity all fail to meet CEQA's requirements that mitigation be clearly defined, enforceable and effective. Measures proposed to reduce impacts to all of these Delta resources are impermissibly vague (such as the mitigation of impacts from conversion of agricultural land "through a combination of acquisition and dedication of agricultural land, acquisition of development rights or conservation easements, or payment of in-lieu fees"), improperly deferred (as is the case with impacts

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<sup>127</sup> *Fed'n of Hillside & Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261; *Anderson First Coal. v. City of Anderson* (2005) 130 Cal.4th 1173, 1186.

<sup>128</sup> *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1115.

<sup>129</sup> *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260 (plan for active habitat management failed to describe anticipated management actions or include standards or guidelines for actions that might be taken).

<sup>130</sup> *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.



public safety from Project construction in areas of unstable soils, for which soil analyses have yet to be performed), and unenforceable (such as mitigation proposed to reduce significant noise impacts from Project construction, which requires voluntary participation by property owners and therefore violates CEQA's mandate of enforceability).

## **IX. THE DEIR FAILS TO IDENTIFY AND MITIGATE SIGNIFICANT IMPACTS TO THE DELTA ENVIRONMENT RESULTING FROM THE PROJECT**

### **A. The Project May Have Significant Adverse Effects on Floodplain Management**

The DEIR purported to analyze potential Project impacts from construction, operation and maintenance on flood protection resources, including flood management systems, drainage patterns and runoff flows, and flood flows within the Project's footprint.<sup>131</sup> Impacts would be significant, according to the DEIR's thresholds of significance, if the Project would cause a substantial increase in water surface elevations of the Sacramento River between the American River confluence and Sutter Slough (Impact FP-1) or if it would alter a site's existing drainage pattern, including through alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner that would result in flooding on- or off-site or impede or redirect flood flows (Impact FP-2).<sup>132</sup> Potential impacts were evaluated based on changes in the water surface elevation (WSE) of the Sacramento River between the confluence of the American River and Sutter Slough, changes in the depth and areal extent of the 100-year flood event surrounding the Twin Cities Complex, and increases in risk of flooding by emergency release through the Southern Forebay Emergency Spillway.<sup>133</sup>

The DEIR concluded that application of Mitigation Measure FP-1: *Phased Construction of the Proposed North Delta Intakes*, would reduce any impacts associated with Impact FP-1 to less than significant,<sup>134</sup> while Impact FP-2, the DEIR concluded, would be less than significant and would not require any mitigation.<sup>135</sup> According to DWR, no Project construction or operation would potentially impact flood protection that phased construction of the intakes would not resolve. The DEIR's analysis failed to consider, however, several factors that could affect Project impacts, including the following:

- The proposed intake locations are subject to deep flooding if there is a breach on the Sacramento River levee or the railroad embankment.
- The levees on the east side of the Sacramento River are only maintained to the 1917 standard and do not meet current standards for flood control.
- The railroad embankment immediately east of the proposed intake locations does not provide sufficient flood control to keep the Beach Stone Lakes water from flooding the proposed intake sites.

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<sup>131</sup> DEIR, p. 7-1, lines 10-12.

<sup>132</sup> DEIR, p. 7-35, lines 39-40; DEIR, p. 7-36, lines 1-4.

<sup>133</sup> *Ibid.*

<sup>134</sup> DEIR, p. 7-44, lines 2-8.

<sup>135</sup> DEIR, p. 7-52, lines 34-35.

- The effective FEMA base flood elevation does not accurately represent the flood levels that could occur at this site given the above circumstances.

The DEIR acknowledges that the Project will cause local drainage impacts,<sup>136</sup> but asserts, without adequate analysis, that impacts will be mitigated. All local drainage and floodplain impacts caused by the construction of Project features, particularly intake structures, tunnel shafts, and reusable tunnel material stockpile areas that could disrupt local drainage and affect overland release should be analyzed in detail and mitigated to the extent feasible. To inform the DEIR's analysis, and the public and decisionmakers, a preliminary grading plan for these features should be developed showing the footprint of all Project features, the type and extent of impacts caused, and the proposed mitigation measures that will be implemented.

Furthermore, Project construction will likely cause significant deterioration of Delta levees due to the heavy volume of construction traffic utilizing the levee roads, which will deteriorate rapidly. The DEIR fails to adequately analyze these impacts from substantial increases in heavy construction traffic, and it refuses entirely to analyze any impacts from heavy truck traffic, insisting that only needs to evaluate the increase in passenger vehicles and light trucks (see section IX.d. for a discussion of traffic and transportation). Project impacts upon flood management in the Delta are likely to be substantial and must be given adequate attention and mitigation.

## **B. The DEIR Fails to Adequately Analyze and Mitigate Project Impacts to Agriculture**

County lands within the Delta include a substantial amount of farmland designated as Important Farmland, including a large area of land uses designated for agricultural or specified compatible open-space uses under the provisions of the California Land Conservation Act of 1965, known as the Williamson Act. Implementation of any of the proposed Project alternatives would result in the conversion of substantial areas of Important Farmland and farmland under Williamson Act contracts or in Farmland Security Zones to non-agricultural uses. Construction and operation of the proposed Project, Alternative 5, would result in the conversion of nearly 1,175 acres of Important Farmland, including nearly 800 acres of land subject to Williamson Act contracts, within Sacramento County, a significant and unavoidable impact.<sup>137</sup>

The DEIR asserts that some of these conversions will be "temporary," defined as impacts that would be "largely limited to the duration of construction activities at a given site but *could* be returned to active farmland after cessation of construction activities."<sup>138</sup> (Emphasis added.) Construction, however, is set to last for 14 years. Despite assurances that "short-term" conversions are "generally" considered to be no more than 2 years, the DEIR contains no legally binding commitment that conversion of agricultural land will not last longer, or that DWR will restore formerly active farmland to pre-Project conditions, and that active agriculture is likely to resume on such lands, nor does it demonstrate how land affected by construction could feasibly be returned to production. Moreover, regardless of whether a conversion may last for 2 years or more than a decade, the DEIR assumes that the Project can suspend completely the livelihoods of the region's farmers for such a prolonged period without any impact. No assurances are provided concerning the continued viability of agricultural operations following the completion of Project construction activities, and the DEIR fails to address the issue of lost agricultural production on prime farmland and how or if growers will be fairly

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<sup>136</sup> DEIR, p. 7-28, lines 33-39.

<sup>137</sup> DEIR, p. 15-34, Table 15-7; DEIR, p. 15-45, Table 15-10.

<sup>138</sup> DEIR, p. 15-25, lines 21-23.



compensated for lost revenues while the land is out of production, such that it may be reasonably assumed they might return to farming after Project construction is concluded.

To reduce Project impacts resulting in conversion of farmland, the DEIR proposes Mitigation Measure AG-1: *Preserve Agricultural Land*. MM AG-1 proposes mitigating permanently converted Important Farmland through a combination of acquisition of agricultural land, development rights, or conservation easements at a ratio of at least 1:1, or “payment of in-lieu fees to fund the acquisition and maintenance of such real property interests by a third party.”<sup>139</sup> Land acquired for the purpose of mitigation, the DEIR asserts, will, to the extent feasible, be “of equal or better farmland quality than the land that was permanently converted.”<sup>140</sup> MM AG-1 insists that preservation of agricultural lands will be within the Delta counties and that agricultural conservation easements will be held by “a qualified organization that has the legal and technical ability to hold and administer agricultural conservation easements for the purpose of conserving and maintaining lands in agricultural production.”<sup>141</sup> An “optional funding approach of funding farm improvements to enhance the productivity of the lower-quality farmland” will also be considered, though no indication of when this optional approach might be considered is given, nor are any organizations named that would be potentially qualified to administer such easements. Even with implementation of MM AG-1, impacts from the conversion of Delta farmland would remain significant and unavoidable “because conservation of agricultural farmland through acquisition of agricultural conservation easements, even at a ratio of 1:1 or greater, would not avoid a net loss of Important Farmland.”<sup>142</sup>

The DEIR applies MM AG-1 to both Impact AG-1, which contemplates Project impacts resulting in conversion of Prime Farmland, Unique Farmland, Farmland of Local Importance, or Farmland of Statewide Importance, and Impact AG-2, Project impacts resulting in conversion of land subject to Williamson Act Contracts or under contract in a Farmland Security Zone. Reasoning that because conversion of land evaluated under Impact AG-2 “largely represents a subset of those impacts previously described under Impact AG-1,” the DEIR concludes that Impact AG-2 is “not additive to those effects” of Impact AG-1.<sup>143</sup> Therefore, no additional mitigation is applied beyond MM AG-1, and impacts would remain significant and unavoidable.<sup>144</sup> The DEIR fails to consider, however, that because the Williamson Act affords an additional layer of preservation protection beyond the underlying Important Farmland designation, application of the same mitigation measure does not comport with CEQA’s mandate that mitigation measures be identified for *each* significant effect described in an EIR.<sup>145</sup> The DEIR should apply a more rigorous mitigation measure to impacts that are more severe, and should require, at a minimum, a 2:1 agricultural easement on land with the same or better designation within the same county. The County of Yolo, for example, generally requires mitigation easements at a 3:1 ratio for the conversion of prime farmland and 2:1 for non-prime farmland. The DEIR does not consider whether such an increased mitigation ratio is feasible, Yolo County noted in their

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<sup>139</sup> DEIR, , p. 15-39, lines 8-12.

<sup>140</sup> *Id.*, lines 12-15.

<sup>141</sup> *Id.*, lines 25-28.

<sup>142</sup> *Id.*, lines 2-6.

<sup>143</sup> DEIR, p. 15-42, lines 4-10.

<sup>144</sup> DEIR, p. 15-47, lines 36-38.

<sup>145</sup> 14 Cal. Code Regs., § 15126.4.

comments on the DEIR, because additional mitigation would “not avoid a net loss of Important Farmland in the study area.”<sup>146</sup>

However, “avoiding” an impact is not the only way an impact can be mitigated to “lessen” an environmental impact.<sup>147</sup> Mitigation also includes minimizing impacts, rectifying the impacts, reducing or eliminating the impact over time, and, significant here, “compensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of such resources in the form of conservation easements.”<sup>148</sup>

We agree with Yolo County that the EIR should analyze the effectiveness of additional mitigation and explain why or why not it is appropriate here.<sup>149</sup> In addition, the DEIR should take into consideration that the preservation of farmland does not reduce the impacts of lost farmland, because the total acreage of agricultural land is still reduced. Mitigation that converts vacant land to agricultural use, or that enhances the productivity of existing agricultural land might address this impact and should be considered in the DEIR.

The DEIR also assessed impacts, in Impact AG-3, to farmland productivity resulting from Project-caused effects such as altered groundwater elevations, degradation of irrigation water from increased salinity, or interference with agriculture-supportive infrastructure, including drainage and irrigation facilities. Impacts were considered significant if they were expected to trigger a “substantial conversion” of Important Farmland to non-agricultural uses.<sup>150</sup> The DEIR does not define “substantial,” nor does proposed mitigation include any performance measures by which to gauge when mitigation is effective or when it is failing to reduce impacts.

Project operations would result in increases in salinity of Delta surface water, as measured by electrical conductivity. The DEIR asserts that this increase would be modest, and therefore not expected to result in conversion of agricultural land to non-agricultural uses.<sup>151</sup> However, as discussed in detail in Section VII.c. above, the DEIR’s application of improper thresholds of significance disguises the Project’s impacts on water quality, which appear less significant than they are. Any impact determination which relies on these erroneous methodologies, therefore, is unreliable.

Only impacts to agriculture-supportive infrastructure, such as drainage and irrigation facilities, were found to be potentially significant due to possible interference with such facilities by Project construction activities.<sup>152</sup> In the case that such disruptions cannot be avoided, the DEIR proposes implementation of Mitigation Measure AG-3: *Replacement or Relocation of Affected Infrastructure Supporting Agricultural Properties*, which would provide new water wells until diversion connection is reestablished, or in the alternative, relocate and/or replace wells, pipelines, power lines, drainage systems, and other infrastructure that

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<sup>146</sup> DEIR, p. 15-39.

<sup>147</sup> CEQA Guidelines, § 15126.4(a)(1).

<sup>148</sup> Yolo County Comments on the DCP DEIR, Dec. 16, 2022, p. 5; CEQA Guidelines, § 15370.

<sup>149</sup> See, e.g., *Save the Hill Group v. City of Livermore*, 76 Cal.App.5th 1092, 1117 (2002) (holding that mitigating at 2.6:1 ratio was “adequate compensatory mitigation” for permanent loss of habitat); see also *Masonite Corp. v. County of Mendocino*, 218 Cal.App.4th 230, 241 (2013) (“The economic feasibility of offsite [agricultural mitigation easements] to mitigate the Project’s impact on the loss of 45 acres of prime farmland must be explored.”).

<sup>150</sup> DEIR, pp. 15-49 to 15-52.

<sup>151</sup> DEIR, p. 15-51, lines 26-28.

<sup>152</sup> DEIR, p. 15-52, lines 15-29.

are needed to support ongoing agricultural uses.<sup>153</sup> Barring these solutions, DWR would compensate owners for production losses attributable to reductions in water supply from diversions, disruptions in drainage facilities, and other infrastructure disruptions.<sup>154</sup> Such impacts, the DEIR asserts, would be less than significant with the implementation of MM AG-3.

Conspicuously absent from the DEIR's assessment of Project impacts to agricultural infrastructure is any detailed analysis of the extent of such impacts, how exactly agricultural resources could be affected, and any evidence tending to support the effectiveness of proposed mitigation. The duration of disruptions, for example, "may last only for the duration of project construction," which could persist for 7 to 15 years, and "would be permanent if the disruption to the infrastructure remains after construction is complete."<sup>155</sup> These vague and undefined terms leave those who stand to be affected with no way to even anticipate the extent or magnitude of how the Project will upend their lives and livelihoods. Furthermore, interference with infrastructure of any kind that supports agriculture in any way, such as roads, power, or water, has the potential for impacting agricultural production by affecting harvest timing, tractor movement, spraying of pesticides, and more, but the DEIR analyzed only disruptions to specific infrastructure facilities, thereby underreporting the extent of the Project's potential impacts to agriculture and likely underestimating the significance of the impacts it does report. Whether the measures proposed in MM AG-3 would effectively reduce the Project's anticipated impacts, not to mention those that are omitted from the DEIR, is unsupported by any evidence. Conclusory statements, such as the claim that MM AG-3 would reduce impacts to infrastructure to less than significant, without management guidelines or performance standards or legally binding conditions, are insufficient and do not meet the requirements of CEQA.

### C. Geology and Seismicity

The potential for seismic risks resulting from Project construction and operations is likely to have significant adverse impacts to County residents, homes, and water supply wells from construction-related vibration and excavation, given the proposed below-ground boring and other construction activities in a highly seismically active region. The DEIR, however, buries analyses of these impacts in engineering project reports and technical memoranda prepared by the Delta Conveyance Design and Construction Authority. Furthermore, though seismic hazards in the Delta are difficult to predict due to the difficulty in characterizing the activity of fault lines in the region, the DEIR concludes, without substantiating evidence, that Project construction and operations would not have a significant effect on geology and seismicity—in contrast to the numerous definitive conclusions, peppered throughout the DEIR, that "risk of seismic activity and levee failures within the Delta" makes the Project necessary.<sup>156</sup> Studies intended to improve understanding of seismic risks, such as an investigation of the West Tracy Fault, a major potentially active fault, are deferred until late in the preconstruction period, which is particularly concerning, as noted by the DISB, because of the potential for the fault to expose the Project and the region's communities to substantial seismic risk.<sup>157</sup>

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<sup>153</sup> *Id.*, lines 39-41.

<sup>154</sup> DEIR, pp. 15-52, lines 42-43, to 15-53, lines 1-2.

<sup>155</sup> DEIR, p. 15-52, lines 21-24.

<sup>156</sup> See, e.g., DEIR, Ch. 2, p. 2-1, lines 32-33.

<sup>157</sup> DEIR, Ch. 10, p. 10-46, lines 30-34.

The DEIR evaluates the Project's potential impacts to geology and seismicity based on whether it would result in an increase in the risk of loss, injury, or death from:

- Structural failure resulting from rupture of a known earthquake fault;
- Strong earthquake-induced ground shaking;
- Earthquake-induced ground failure, including liquefaction and related ground effects;
- Ground settlement, slope instability, or other ground failure;
- Structural failure resulting from Project-related ground motions; and
- Seiche or tsunami.<sup>158</sup>

The DEIR acknowledges that tunnel construction would cross under levees, railroads, highways, and aqueducts, and involve vibration-causing tunnel boring and excavation, pile driving, and use of heavy construction equipment.<sup>159</sup> Some of these activities would have the potential to cause adverse effects such as liquefaction and ground settlement, lateral spreading, and damage to structures and levees, possibly resulting in personal injury or death.<sup>160</sup> The DEIR concludes, in each assessment of seismic impacts, that any impacts would be less than significant.<sup>161</sup> No substantial evidence, nor the locations of analyses on which conclusions were based, is provided. The DEIR provides as support only vague assurances, such as promises (without legally binding agreements) that further studies will be done to assess the potential for increased hazards at construction sites, or statements that compliance with applicable safety standards and regulations will avert risks, or that because effects resulting from ground-moving activities such as liquefaction "is rare," "it is unlikely" that impacts from such activities would occur.<sup>162</sup> None of these conclusory statements offer any way for the public or decision makers to independently evaluate the adequacy of these analyses.

#### **D. The DEIR Fails to Fully Analyze or Mitigate Impacts to Traffic and Transportation**

The Sacramento County Department of Transportation (DOT) anticipates that the Project will have significant adverse impacts on the nature of travel in the Delta. Heavy construction traffic will be introduced for many years into a rural setting. Not only will communities feel the effects of substantial increases in construction traffic, but pavement conditions in the Delta will deteriorate to a point of disrepair. Much of the Delta's early roadway network was built over old trails that ran along the tops of levees. Construction impacts to roadways will be significant, and roadways may need to be reconstructed to current structural standards. Close coordination with Sacramento County on the nature and extent of mitigation will be required.

Though the DEIR's evaluation of Project impacts to traffic and transportation in the Delta acknowledges that impacts from increased average vehicle miles traveled (VMT) in the Delta during construction would be significant and unavoidable even after mitigation, substantial gaps in its analysis raise

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<sup>158</sup> See DEIR, p. 10-2, Table 10-0.

<sup>159</sup> See DEIR, p. 10-55.

<sup>160</sup> DEIR, Ch. 10, p. 10-62, lines 5-25.

<sup>161</sup> DEIR, p. 10-2, Table 10-0.

<sup>162</sup> See, e.g., DEIR, Ch. 10, p. 10-62, lines 22-25.

serious questions about the veracity of its conclusions and whether the significance of impacts was in fact masked by faulty methods of analysis.

For example, the DEIR applies what appears to be an arbitrary threshold for inclusion in its analysis - only roadways anticipated to have 50 or more vehicles on them during peak hours.<sup>163</sup> This results in the omission of several area roads from evaluation of impacts that are likely to be significant. The DEIR's stated thresholds of significance reject the state's own published CEQA guidance and do not fairly or accurately assess the significance of adding trips to the rural Delta region. As a threshold for VMT significance, for example, the DEIR analyzes whether Project activities would result in average VMT exceeding the regional employee average home-based work VMT of 22.5 miles per day.<sup>164</sup> The Office of Planning and Research, however, in an effort to meet long-term state climate goals through VMT reduction, recommends use of an impact threshold for which per capita VMT that exceeds 15 percent *below* existing conditions is deemed significant.<sup>165</sup> DWR rejects this threshold, insisting that this method of measuring impact analysis should not apply to the Project because it "varies from the standard CEQA approach of defining existing conditions as the baseline for analysis and is not directly applicable to construction of water supply infrastructure facilities."<sup>166</sup> The DEIR provides no rationale for the absurd assertion that water supply infrastructure facilities merit the use of unique thresholds for evaluating significance of construction traffic impacts.

As a result, the DEIR uses the 22.5 mpd per regional employee average as both a baseline *and* a significance threshold. Consequently, the DEIR improperly presumes that any VMT average less than 22.5 mpd (per employee) would not be significant. This is particularly problematic in light of the sheer volume of additional trips that Project construction and operation would add to the region, even if they individually average less than 22.5 miles per day.

In general, the DEIR fails to identify significant Project-related trucking impacts for the entire Project area, and fails entirely to assess or mitigate the degradation of roadways in the Delta resulting from the increase in heavy truck traffic in a rural location that rarely sees traffic of this magnitude. Site-specific trucking impact studies should be done for each project impact area and should contain detailed truck traffic information, including haul routes, haul volumes per truck, haul truck types, number and frequency of trucks, proposed hauling hours and affected roadway traffic volumes. Based on the results of the studies, a summary of the roadway impacts and proposed remediation efforts that will be undertaken to account for the roadway degradation and damage must be included.

#### **E. The DEIR Vastly Underestimates Project Impacts on Energy Use**

The DEIR indicates that the Project will increase energy consumption compared to existing conditions—shown as annual average long-term operational SWP energy generation, energy use, and net

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<sup>163</sup> DEIR, Ch. 20, p. 20-6, lines 11-14.

<sup>164</sup> DEIR, p. 20-25, lines 30-31.

<sup>165</sup> OPR Technical Advisory on Evaluating Transportation Impacts in CEQA, pp. 10-11.

<sup>166</sup> DEIR, p. 20-26, lines 7-19.



energy consumption—by 35 percent.<sup>167</sup> As the largest single consumer of electricity in California, any increase in energy use by the SWP is a significant increase in the state.<sup>168</sup>

California relies on an energy mix of roughly 67 percent non-renewable resources according to the DEIR.<sup>169</sup> The impact of adding to the state’s overall energy use a 35 percent increase in SWP uses is inadequately analyzed in the DEIR, and stands to have a significant impact on the environment, including from the additional greenhouse gas emissions generated by this increase.

An EIR should consider potentially significant impacts of a project caused by wasteful, inefficient, or unnecessary consumption of energy, and must include mitigation measures to reduce these impacts.<sup>170</sup> Project impacts to energy use according to this standard are evaluated under Impact ENG-1, but the DEIR fails to adequately represent these impacts resulting from its proposal to replace a system of conveyance which requires no outside energy input with one that would require massive amounts of electricity (as exhibited by the Project’s need for high-voltage power lines and energy infrastructure) to operate. Currently, water flows through the Delta to existing SWP conveyance facilities, where significant energy consumption is already required to export water from the Delta. The proposed Project, with the conveyance system’s two new pumping plants that require significant additional energy to operate, will result in wasteful, inefficient and unnecessary power consumption compared to the existing condition, as such massive additional power consumption is not needed or consumed today, despite the DEIR’s dubious conclusion that impacts associated with energy consumption will be less than significant. This significant impact begs consideration in the DEIR of a through-Delta conveyance alternative, which would avoid this significant impact along with many others.

Impact ENG-2 states that the Project would result in significant impacts if it would conflict with or obstruct any state or local plan, goal, objective, or policy for renewable energy or energy efficiency.<sup>171</sup> DWR asserts on its website that “Fifty percent of the SWP’s power is provided by its own emission-free hydroelectric generation. The SWP, which is committed to reducing its carbon footprint, has a power portfolio consisting of 65 percent carbon-free resources, increasing to 75 percent by 2030 and 100 percent by 2045. DWR is finding innovative ways, such as adding solar to the system, to make this happen.”<sup>172</sup> This set of goals is referenced in the DEIR,<sup>173</sup> but omitted from the discussion is how the increase in energy demand associated with the Project will affect these goals by making them more difficult to achieve. Furthermore, these goals are just that—goals, and not binding commitments that can be relied upon to regulate power consumption and type. It can be presumed that by increasing SWP energy demands by 35 percent, meeting these goals becomes more difficult and costly, and the lack of legal obligation makes it even more likely they will be disregarded. The increased time or energy required, as well as the additional costs that are directly attributed to the Project, needs to be quantified. Any increase in power consumption by the SWP will strain the system further.

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<sup>167</sup> DEIR, Ch. 22, p. 22-23, Table 22-12.

<sup>168</sup> Department of Water Resources, <https://water.ca.gov/What-We-Do/Power>.

<sup>169</sup> DEIR, p. 22-4, Table 22-1.

<sup>170</sup> Pub. Resources Code, § 21100, subd. (b)(3).

<sup>171</sup> See DEIR, p. 22-2, Table 22-0.

<sup>172</sup> <https://water.ca.gov/What-We-Do/Power#:~:text=The%20State%20Water%20Project%20%28SWP%29%2C%20operated%20by%20DWR%2C,the%20type%20of%20water%20year%20%28dry%2C%20average%2C%20wet%29.>

<sup>173</sup> DEIR, p. 22-12, lines 25-27.

The State of California has instituted a multitude of energy-decreasing goals, including phasing out gas-powered vehicles as stated in Executive Order N-79-20. The Project's anticipated 35 percent increase in energy consumption will negatively impact the achievement of these energy-conservation objectives. The DEIR fails to adequately analyze how the Project will affect these goals, and should be revised to include itemized analysis of the state's enumerated goals and the Project's impacts on their achievement.

#### **F. The DEIR Fails to Properly Analyze and Mitigate Project Impacts on Noise Levels**

In determining whether a project's noise impacts will be significant, CEQA guides agencies to consider whether the project will generate temporary or permanent increases in ambient noise levels in the project's vicinity that would exceed set standards, and to combine a qualitative analysis of impacts as they relate to existing conditions along with a quantitative analysis of maximum allowed noise levels and project-related increases in noise.<sup>174</sup> While agencies are free to choose which significance threshold to apply, they do not have discretion to consider only maximum noise levels and ignore increases in noise relative to existing conditions, and must consider both the "absolute noise level" associated with a project as well as the increase in the level of noise that will result.<sup>175</sup> In addition, an EIR may not confine the scope of its analysis of noise impacts to an arbitrary distance from the project's noise-causing activity.<sup>176</sup> A project's setting may be a key factor in determining whether a project's noise impacts are significant.<sup>177</sup>

The DEIR considered in its analysis of Project noise impacts "all land within a 2-mile radius of aboveground construction sites and locations of new project-related infrastructure. This 2-mile buffer is used to describe the distance that potential levels of noise from project construction areas would attenuate below existing ambient levels."<sup>178</sup> Impacts from vibration from Project construction and operation of the project "would be localized within a smaller buffer (less than 1/10 mile) inside the study area and would not be discernible outside the study area."<sup>179</sup> To establish existing ambient sound levels in Sacramento County, sound-level monitoring, during which sound data was collected continuously over a period of at least 24 hours, was conducted at two locations in the town of Hood, one about 200 feet from State Route 160/River Road, and the other about 200 feet from Hood-Franklin Road.<sup>180</sup>

In determining whether the Project would result in "substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies," the DEIR used criteria based on DWR's Standard Specification 05-16.<sup>181</sup> Noise levels during Project construction would be considered to exceed daytime noise criteria where "overall equipment noise levels are predicted to exceed 60 dBA on an hourly Leq basis, AND overall equipment noise levels are predicted to increase by 5 dB or more relative to existing daytime ambient noise levels at sensitive receptor locations."<sup>182</sup> Nighttime noise criteria were exceeded where overall equipment noise levels are "predicted to exceed 50 dBA on an hourly Leq basis, AND overall equipment noise

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<sup>174</sup> *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 883.

<sup>175</sup> *Id.*, pp. 887 and 893.

<sup>176</sup> *Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 106.

<sup>177</sup> *National Parks & Conserv. Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1358.

<sup>178</sup> DEIR, Ch. 24, p. 24-3, lines 4-7.

<sup>179</sup> *Id.*, lines 9-11.

<sup>180</sup> DEIR, Ch. 24, p. 24-10, lines 2-9.

<sup>181</sup> DEIR, Ch. 24, p. 24-26, lines 9-25.

<sup>182</sup> *Id.*, lines 13-16.



levels are predicted to increase by 5 dB or more relative to existing nighttime ambient noise levels at sensitive receptor locations.”<sup>183</sup> The DEIR does not explain the use of this threshold of significance, and fails to support the use of DWR criteria over other noise standards, such as those set by Sacramento County in its General Plan, with substantial evidence.

Courts have held that compliance with regulations, including noise ordinances, is not an adequate significance threshold because it does not foreclose the possibility of significant impacts.<sup>184</sup> Reliance on a maximum noise level as the sole threshold of significance for noise impacts fails to consider whether the magnitude of changes in noise levels is significant.<sup>185</sup> Evidence submitted by local residents and experts attesting to potentially significant noise impacts is sufficient to support a fair argument that noise impacts are potentially significant notwithstanding project compliance with existing noise regulations. An agency’s reliance on the project’s compliance with noise regulations did not constitute substantial evidence supporting a finding of no significant impacts.<sup>186</sup>

The DEIR fails to support with substantial evidence its use of a 5 dB increase relative to existing ambient noise levels. Courts have held that the setting of a project may play a role in determining whether a project’s impacts are significant.<sup>187</sup> It is hard to imagine a project to which this rule is more applicable: the setting of the DCP—the Delta’s unique and rural character is so significant that it has been given special status as a Natural Heritage Area by the U.S. Congress—should factor into any decision regarding thresholds of significance, and especially for noise. It is unclear—because the DEIR does not provide any evidence—whether a 5 dB increase threshold was chosen because numerous agencies have chosen that same threshold when analyzing noise increases, but conformity with the custom of other agencies does not relieve DWR of the duty to support its decisions with substantial evidence.

Furthermore, most of the actions designed to reduce noise impacts to sensitive receptors included in Mitigation Measure NOI-1: *Develop and Implement a Noise Control Plan*, require voluntary participation by residents and property owners and are therefore unenforceable and their effectiveness unable to be measured. Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding.<sup>188</sup> Mitigation measures that require development of a mitigation plan based on future studies are legally inadequate if they do not describe the anticipated management actions and do not include management guidelines or performance standards which describe levels of reduction in impact significance that must be achieved in order for impacts to be fully and effectively mitigated.<sup>189</sup> CEQA requires an agency to conclude that an impact is less than significant only after it produces rigorous analysis and concrete substantial evidence justifying the finding. The DEIR concludes that even though MM NOI-1 would reduce the severity of impacts to less than significant, the lack of enforceability requires a determination that impacts would remain significant and unavoidable.<sup>190</sup> This mischaracterizes the nature of MM NOI-1, which should not be

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<sup>183</sup> *Id.*, lines 19-21.

<sup>184</sup> *Keep our Mountains Quiet v. Santa Clara* (2015) 236 Cal.App.4th 714, 733; *CBE v. CRA* (2002) 103 Cal.App.4th 98, 115-16; *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893.

<sup>185</sup> *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 865.

<sup>186</sup> *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732-734.

<sup>187</sup> *National Parks & Conseq. Ass’n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1358.

<sup>188</sup> PRC § 21081.6(b); 14 CCR § 15126.4(a)(2); *Lotus v. Dep’t of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.

<sup>189</sup> *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260 (plan for active habitat management failed to describe anticipated management actions or include standards or guidelines for actions that might be taken).

<sup>190</sup> DEIR, Ch. 24, p. 24-64, lines 11-14.

considered mitigation at all, due to its voluntary participation and lack of enforceability. It is particularly outrageous and objectionable to the County that Delta residents would be subjected to significant noise impacts from a project designed only to benefit water users hundreds of miles away, and that these communities would learn in the DEIR that their State government has determined the only means of mitigating these impacts is for the impacted citizens to endure the additional burden of physical modifications to their homes and businesses. Moreover, the DEIR's improper framing of MM NOI-1 as a mitigation measure that would adequately reduce impacts if implemented to its full extent is unsupported by any evidence that MM NOI-1 would be effective, even if implemented as suggested. This gives the DEIR the appearance of having proposed adequate mitigation, when in fact no mitigation for Project noise impacts has been identified.

### **G. The DEIR Fails to Identify and Mitigate Impacts to Cultural Resources**

Under CEQA, objects of historic significance fall within the definition of environment that can be affected by a proposed project, and significant adverse impacts to historic resources are classified as significant environmental impacts.<sup>191</sup> A resource listed or eligible for listing on the California Register of Historic Resources or the National Register of Historic Places must be treated as a historic resource for the purposes of CEQA.<sup>192</sup> Resources designated as historically significant in a local register of historic resources or identified as significant in an approved historical resources survey are presumed to be significant.<sup>193</sup>

Every Project alternative proposed in the DEIR features facilities and construction activities that would occur in the vicinity of the Delta's unique cultural resources, including built-environment historical resources and archeological resources. According to the DEIR, the Project would result in significant impacts to these resources if it would result in material impairment of the qualities that qualify a resource as historical, such as demolition or alteration to the resource or its immediate surroundings, including introduction of incompatible features to the setting.<sup>194</sup>

The DEIR identified 7 historic resources located in Sacramento County that are in the path of at least one of the Project's proposed alternatives and may be significantly impacted by Project construction or operation.<sup>195</sup>

The DEIR does not discuss or analyze the Project's impacts to cultural and historic resources in the context of the Sacramento-San Joaquin Delta National Heritage Area ("Delta NHA") legislation (2019, S.47). National Heritage Areas (NHAs) are designated by Congress as places where natural, cultural, historic, and recreation resources combine to form a cohesive, nationally important landscape. The DEIR's failure to acknowledge the Delta NHA constitutes a glaring omission in its accounting of the Delta's environmental setting with respect to cultural resources, as well as its section discussing applicable laws, regulations and programs.<sup>196</sup>

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<sup>191</sup> Pub. Resources Code, § 21084.1; 14 Cal. Code Regs., § 15064.5.

<sup>192</sup> Pub. Resources Code, § 21084.1; 14 Cal. Code Regs., § 15064.5, subd. (a)(1).

<sup>193</sup> 14 Cal. Code Regs., § 15064.5, subd. (a)(2).

<sup>194</sup> DEIR, Ch. 19, p. 19-33, lines 12-21.

<sup>195</sup> DEIR, Ch. 19, pp. 19-17–19-19, Table 19-3.

<sup>196</sup> See pp. 19-4 – 19-28.

The DEIR identified 31 built-environment historical resources within the Project’s area of impact, which is defined, for built-environment cultural resources, as “one parcel out from proposed above-grade water conveyance features,” except for those instances where proposed water conveyance features are all planned within a large parcel and all are situated at least 1,000 feet from the next parcel’s boundary, in which case no additional parcel is included in the area of impact.<sup>197</sup> The DEIR acknowledges that “[e]ach of the project activities . . . has the potential to affect built-environment historical resources . . . .”<sup>198</sup> Chapter 19’s impact discussion indicates that these impacts will result from Project construction of new features or alteration of existing features within the setting of historical resources, or the physical alteration of character-defining features within the boundaries of those resources. Details of those impacts and their specific causes, however, is omitted from the impact discussion; readers are directed to Appendix 19C if they want any more granularity beyond this vague description of the effects of Project construction activity on the community. That appendix, however, offers little more than terse and narrow explanations of impacts listed for each built-environment resource according to alternative alignments (Central, Eastern, Bethany Complex), as well as in the Compensatory Mitigation Areas. The DEIR’s discussion of impacts obliges the reader to search through multiple documents to root out the pertinent information, which, it turns out, is uninformative and insufficient for any meaningful independent review.

It is unclear what indirect impact construction vibrations may have to the historic built environment, though the document identifies mitigation measures to brace resources that may be indirectly impacted. The DEIR does not specifically identify which resources may be impacted by construction impacts. There are historic districts listed on the National Register of Historic Places that are located less than 2 miles from work sites, including the town of Locke Historic District (also a National Historic Landmark), Walnut Grove Japanese-American Historic District, Walnut Grove Chinese-American Historic District, and Walnut Grove Commercial/Residential Historic District. The potential impacts to these resources need to be addressed, including impacts that could occur if Project-induced levee failure were to result in flooding, which could destroy these resources. While levee failure remains an existing risk in the Delta, the Project construction would exacerbate this risk, increasing the chances that irreplaceable historic and cultural features may be irreparably altered or destroyed. Additionally, if mitigation is needed to brace resources during construction, this bracing may be needed for some time, as construction of the project may take up to 14 years to complete.

The DEIR states that “. . . if demolition is required in temporary work areas, the resulting impact would be permanent. Temporary construction activities that include ground disturbance, such as construction of staging areas and temporary on-site access roads and utilities, have the potential to permanently affect archaeological resources and would be better characterized as a permanent impact.”<sup>199</sup> The document does not go on to specify what known built-environment resources would be permanently affected by construction of staging areas, access roads and utilities. Therefore, impacts within these areas have not been fully identified. The DEIR is deficient as an informational document for its failure to identify these impacts.

Mitigation Measure CUL-1 includes a “Built Environment Treatment Plan,” which includes: “viii. Relocation of historic buildings that would otherwise be demolished.”<sup>200</sup> The location of a historical resource is one of seven points of integrity. A resource is considered historical when it has both significance

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<sup>197</sup> DEIR, p. 19-5, lines 9-17.

<sup>198</sup> DEIR, p. 19-37, lines 30-31.

<sup>199</sup> Ch. 19, p. 19-37, lines 18-21.

<sup>200</sup> DEIR, p. 19-47, line 43.

and integrity. A loss of integrity is a loss of a historical resource. Relocation of a historical resource means it is no longer eligible for the California Historical Register or the National Register of Historical Places. The EIR should acknowledge this limitation of the Built Environment Treatment Plan. By failing to acknowledge that relocation of historic buildings would effectively eliminate their integrity, the DEIR fails to adequately disclose the extent of project impacts, notwithstanding its conclusion that impacts would be significant and unavoidable.

#### **H. Project Impacts to Recreation are not Analyzed or Mitigated**

The DEIR evaluates potential impacts to recreation in the Delta in terms of whether Project construction or operations will have an effect on parks or recreational facilities such that construction or expansion of existing or planned facilities would have an adverse physical effect on the environment.<sup>201</sup> The DEIR fails to evaluate, however, the impacts to Delta recreation that may result from other physical effects the Project will have on the environment. The thresholds used to determine impact significance were based on CEQA's Appendix G,<sup>202</sup> which seem designed to evaluate impacts on recreation in the context of a residential development, not a large-scale water supply infrastructure project that will affect the extensive recreational facilities in its path for years, if not permanently. These thresholds, furthermore, are clearly not designed to take into account a community highly dependent on a long-established and robust recreation economy, the protection and enhancement of which is an essential responsibility of several state agencies, including the Delta Protection Commission's mandate to "enhance the unique cultural, recreational, and agricultural resources of the Delta."<sup>203</sup> Recreation in the Delta, whether nature-based, cultural, or enjoyed through boating, hiking, fishing, or scenic drives, is one of the region's most important land uses, as reflected by its popularity and the number of visitors it brings to the region every year. The DEIR fails to accurately or honestly disclose the full extent of Project impacts to recreation in the Delta. Those impacts would impede the mission of the Delta Protection Commission, as well as conflict with Delta Plan Policy P2's directive to protect existing land uses and Policy DP R11's promise to provide new and protect existing recreation opportunities.

Chapter 16 of the DEIR states that past studies that evaluated recreation use and recreation user characteristics showed that boating and fishing were amongst the most popular recreation uses at that time. Yet, the Recreation chapter narrowly draws its consideration of impacts to whether the Project would (1) increase the use recreational facilities and (2) include new or expanded recreational facilities that would impact the environment. The DEIR's discussion of recreation only briefly and dismissively addresses the Project's impact on river/reservoir levels, water quality and the resulting effect on river-dependent recreational uses. Meanwhile, DEIR chapter 5 tersely concludes that changes in surface water levels are not considered impacts. Changes in river levels could significantly impact river-dependent recreational uses, including marinas and riverside parks. The DEIR, however, does not analyze this impact in quantitative fashion and barely so in qualitative terms. The Project (and alternatives)'s effect on surface water levels as it affects recreation opportunities and experience must be addressed in greater depth and its summary conclusions supported.

In particular, the DEIR fails to examine recreation impacts to upstream (Sacramento and American Rivers) areas like the Garcia Bend Park and Marina, Miller Park, American River Parkway, and Lake Natoma.

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<sup>201</sup> DEIR, Ch. 16, p. 16-19, lines 13-18.

<sup>202</sup> *Id.* at lines 6-8.

<sup>203</sup> See Delta Plan, Ch. 5, Table 5-3, pp. 190-191; Pub. Resources Code, § 29703.5.

A change in river flows resulting from the Project could potentially impact access to recreation on the river, parking and trails, and may cause scouring of riverbanks, trails, and access areas near the American River. The DEIR should evaluate the Delta Conveyance effect on American River flows upstream of Discovery Park and attendant recreation impacts. The revised analysis should address American River Parkway Plan land use policies for potentially impacted land use areas.

The DEIR does not mention impacts upon hiking/walking trails at Cosumnes River Preserve. The Project will have impacts (noise, dust, traffic) upon the use of the Cosumnes River Preserve due to boring and other construction activity at the Twin Cities Tunnel Shaft. The Cosumnes River Preserve has an estimated 70,000 actual visitation numbers (DEIR, p. 16-17, Table 16-6), thus a significant attractor of sensitive receptors (recreation users). Annual visitation to Cosumnes River Preserve has increased in recent years.

The 14-year construction period (DEIR, p. 16-23, line 20) would significantly impact recreation opportunities at the Cosumnes River Preserve and Stone Lakes National Wildlife Refuge. Many recreation users would likely avoid recreation areas nearby construction sites due to potential concerns about increased noise, dust or traffic. Wildlife would also be impacted – during the fall/winter migration the Cosumnes River Preserve frequently has over 100,000 birds. Cosumnes River Preserve and Stone Lakes (adjacent to Intakes B and C) visitation would be significantly impacted. The DEIR vaguely observes that some recreation users would avoid “construction areas” for these reasons without expressly acknowledging the specific impact to the adjacent Stone Lakes and Cosumnes River Preserves.<sup>204</sup> Again, the DEIR only considers whether some recreation use would shift to and increase the burden on other recreational locations, but does not consider how it would diminish or degrade the recreational experience at adjacent recreation areas.

The DEIR states that “current waterways and existing parks and recreation areas in the Delta have not been found to be over capacity and could accommodate some additional recreation use if any recreationists choose not to frequent waterways or recreation facilities closest to project construction areas.”<sup>205</sup> The DEIR does not explain how this was determined. Cosumnes River Preserve, which the County of Sacramento helps operate, frequently experiences visitor numbers over its capacity. Parking lots are full and visitors have to park along Franklin Boulevard. The DEIR does not explain where the 70,000 or more visitors who regularly visit the Cosumnes River Preserve might recreate as an alternative, or the impacts to facilities that would experience a substantial increase in visitors as a result of the Project.

The DEIR is evasive, misleading and inaccurate in its representations regarding the proximity of Project features to existing recreational resources. The DEIR notes that above ground physical changes to the environment such as the intakes, the Twin Cities Complex shaft site and Reusable Tunnel Material (RTM) stockpile area at Twin Cities Road “potentially would be near” recreational areas.<sup>206</sup> This does not account for the close proximity of the Stone Lakes and Cosumnes River Preserves to these facilities. Moreover, the assertion that “[DCP] facilities have been generally sited away from most recreation areas, other than the discharge facility under Alternative 5 which is within Bethany Reservoir SRA” is patently incorrect.<sup>207</sup> From a

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<sup>204</sup> DEIR, p. 16-24, lines 1-3.

<sup>205</sup> DEIR, p. 16-24, lines 6-9.

<sup>206</sup> DEIR, p. 16-20, lines 1-2.

<sup>207</sup> DEIR, p. 16-35, lines 11-13.



regional or even local perspective, Intakes B and C are adjacent to the Stone Lakes and the Twin Cities Complex is adjacent to the Cosumnes River Preserve.

Although the document briefly observes that “[t]he Delta Conveyance Project has features that would change the landscape of several areas of the Delta where recreationists view or sightsee,”<sup>208</sup> it does not meaningfully consider how those permanent changes will affect the recreational user experience, including the visual perspective, at Stone Lakes and the Cosumnes River Preserve. The effect will be significant. From the on-the-ground visual perspective of the Cosumnes River Preserve, RTM mounds of 15 feet high (or an equally high circle levee) will be a substantial artificial change to an otherwise characteristically flat, natural Delta landscape. It will constitute an incrementally significant unnatural addition to the surrounding scenery. This is a substantial adverse impact to the public interest, both in terms of aesthetic and recreational value of viewing a natural landscape in and around the Preserve.

#### **I. Project Impacts to Aesthetics are not Adequately Analyzed or Mitigated**

In general, the construction and operation of the large-scale physical features of the proposed diversion, conveyance and water operations facilities, in concert with the addition of significant levels of artificial light/glare to the night sky of this rural portion of the County, will result in a substantial adverse permanent change in the scenic quality and natural beauty of the Delta. These impacts will not only degrade the visual character of a National Heritage Area but also permanently diminish the quality of life for Delta residents.

The DEIR states that “[a]n important impact to consider is the permanent impact on visual resources after the completion of construction of water conveyance features.”<sup>209</sup> While it is certainly critical for the DEIR to consider the permanent impacts on visual resources after completion of the project, given the magnitude and length of the Project from a construction standpoint, impacts to visual resources are equally important *during* the construction phase.

The DEIR identifies significant and unavoidable impacts associated with all alternatives for the following impacts:

AES-1: Substantially degrade the existing visual character or quality of public views (from publicly accessible vantage points) of the construction sites and visible permanent facilities and their surroundings in nonurbanized areas.

AES-2: Substantially damage scenic resources including, but not limited to, trees, rock outcroppings, and historic buildings visible from a State Scenic Highway.

AES-3: Have substantial significant impacts on scenic vistas.<sup>210</sup>

Table 18-0 indicates that all alternatives would have less than significant impacts associated with:

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<sup>208</sup> DEIR, p. 16-35, lines 10-11.

<sup>209</sup> DEIR, p. 18-1, lines 15-17.

<sup>210</sup> See DEIR, p. 18-2, Table 18-0.



AES-4: Create new sources of substantial light or glare that would adversely affect daytime or nighttime views of the construction or permanent facilities.

Impacts AES-1 – AES-3 narrowly consider impacts to “public views”, which ignores the cumulative impacts associated with views on and from private lands, including the extensive number of private lands affected by the Project, and privately held lands that are open to the public for commercial and tourism purposes. By narrowly defining the scope of the analysis, the EIR fails to disclose the true impacts to sensitive residential, agricultural, commercial and recreational users. One of the most glaring omissions of the DEIR is the absence of any visualizations or renderings of Project facilities from the rural communities most impacted by the Project. DWR indicates it was only able to take photographs from public rights of ways. The County, however, disagrees that similar photos, visual representations, and renderings could not have occurred in rural communities such as Hood, Courtland, etc. DWR provides no evidence that it attempted to obtain access to locations from which it could take photos or otherwise obtain images that would enable the creation of visualizations that would show what the Project construction and facilities would look like from Delta recreation spots, homes and businesses, such as wineries, for which the existing aesthetic is an essential component of their character and viability. This arbitrary limitation on methods is misleading and unacceptable.

With respect to AES-3, the County disagrees that the Project or DEIR alternatives would have a less than significant impact associated with light and glare. The rural, undeveloped nature of the Delta renders it highly sensitive to new sources of light. For example, the introduction of fifteen years of construction sites and, thereafter, well-lit industrial facilities to existing undeveloped (and unlit) farmland on either side of the small town of Hood is a radical change to the environs and will result in significant changes in visibility of the night sky.

The defined “Study Area” described in Section 18.1.1 emphasizes that visual impacts can only result from “new structures.”<sup>211</sup> Reiterating the statement from Chapter 5, *Surface Water*, that the Project “does not propose any changes to operations of the Delta,” this section acknowledges that “due to potential, indirect upstream reservoir changes from project operations, there is a low potential for aesthetic impacts” to upstream reservoirs, including Folsom Lake.<sup>212</sup> Insisting that these impacts would be “minimal” and “within the existing fluctuations in storage and elevation patterns,” the DEIR concludes there is no potential for a significant impact on visual character of upstream reservoirs.<sup>213</sup> Footnote 1 on DEIR page 18-4 indicates that, in fact, Folsom Lake will experience the greatest impacts, as demonstrated by modeled end-of-month storage decreases at the lake, relative to existing conditions, of up to 2 percent, on average, in above-normal years in November and December under Alternatives 1, 2b, 3, 4b, and 5. Despite its failure to provide even the bare minimum of support for its conclusion that a 2 percent decrease is insignificant (in a reservoir that is already critically low), the DEIR dismisses any further discussion of these impact conditions. Further, there is no mention of visual impacts to the American River and associated American River Parkway.

The DEIR attempts to categorize the sensitivity levels of certain viewer groups.<sup>214</sup> With respect to “roadway travelers,” the sensitivity reasoning fails to acknowledge that this group can be significantly

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<sup>211</sup> DEIR, p. 18-4, lines 17-29.

<sup>212</sup> *Id.*, lines 21-23.

<sup>213</sup> *Id.*, line 27.

<sup>214</sup> See DEIR, pp. 18-13 to 18-14, Table 18-3.

impacted by light and glare, such as that emanating from construction sites and new industrial sites in otherwise dark areas.<sup>215</sup>

The discussion incorrectly characterizes the experience of rail travelers as being “fleeting and temporary” due to high speeds.<sup>216</sup> On the contrary, given the vast, open landscapes of the Delta, a conventional passenger train (not “high speed rail”) allows for an extended opportunity to take in the vistas along the rail lines. Indeed, a typical passenger train (e.g., Amtrak) provides large windows for this very reason: to enhance the ability of its riders to focus on scenic qualities from the vantage point of the train.

The DEIR states that no impact would result from increases in light and glare that would “restore natural areas or brighten unnaturally dark conditions.”<sup>217</sup> This counterintuitive rationale allows the DEIR to mischaracterize both the environmental setting and the resulting impact based upon DWR’s view of what constitutes “natural restoration” or a naturally dark condition. It is unclear how the introduction of new sources of artificial light and/or glare could restore a natural area. It is also unclear how the natural, undeveloped setting of the Delta environment could be characterized as “too dark” at night.

The DEIR states that an alternative would have a significant impact if it would: “Substantially degrade the existing visual character or quality of public views of the site and its surroundings in a nonurbanized area.”<sup>218</sup> This threshold is unduly narrow and thus fails to ensure that the DEIR considers and discloses the full extent of Project impacts. The scope of this significance threshold is limited to “public views” but must include within that category, and the associated impact analysis, views from privately held properties that are generally open to the public, such as vineyards, nature preserves or businesses. Moreover, given the extensive number of private views that will be affected, and the size and scale of Project activities and facilities (each intake is approximately ¼ mile long, large and noisy construction trucks will be moving through Delta communities), there is no reasonable basis for limiting consideration of impacts to “public views.” The Project’s impacts on Delta residents will not be equivalent to blocking the view for a single home or a small number of homes. The DEIR primarily focuses its visual impacts analysis on proposed intake and conveyance facilities – i.e., physical improvements and structures, while summarily dismissing the potential for significant impacts to waters. There is potential, however, for substantial adverse impacts, both project-specific and cumulative, to upstream resources including river and water reservoirs. For example, the 2.0 percent decrease in Folsom Reservoir and other bodies of water is cumulatively considerable in conjunction with other factors that will decrease water levels such as drought and climate change. The DEIR suggests that fluctuating water levels in rivers and reservoirs could have impacts, yet the EIR fails to analyze potential impacts to the American River Parkway.

The DEIR concludes that the aesthetic impacts associated with construction of the intakes would be “substantial.”<sup>219</sup> The analysis, however, does not make it clear that the project would impact a more than 5-mile stretch surrounding the Town of Hood with substantial impacts. There is only one exhibit that shows the existing and rendered views of any of the proposed intakes (Intake C). All renderings represent misleading depictions, with fully mature trees; this is an unlikely scenario for 20-30 years until after construction is

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<sup>215</sup> *Ibid.*

<sup>216</sup> *Id.*

<sup>217</sup> See DEIR, p. 18-44, line 1.

<sup>218</sup> See DEIR, p. 18-44, lines 21-22.

<sup>219</sup> DEIR, p. 18-51, line 39.

complete (up to 14 years), with the result that the DEIR misleadingly fails to accurately disclose the extent of Project impacts. Finally, the analysis of visual impacts related to the intake facilities does not provide views or renderings of the intake facilities from the river. These intakes will be visible from the river, which will substantially degrade the existing visual character for people boating and fishing along these reaches of the river, and the DEIR does not disclose the magnitude of the impacts to the visual resources along the river. It is not enough for the DEIR to simply conclude the visual impact will be significant. These omissions constitute an informational failure of the DEIR.

#### **X. THE DEIR FAILS TO Assess HOW AUGMENTED WATER SUPPLY EXPORTS WILL INDUCE GROWTH IN PARTICIPATING WATER DISTRICTS**

Despite proposing the construction and operation of the largest statewide water supply project in half a century, DWR devotes only ten pages to discussion of how this massive utility infrastructure project that can be used in tandem with the existing SWP Banks pump, might induce new growth.<sup>220</sup> The DCP will allow for at least a 23 percent increase in annual SWP Delta Exports.<sup>221</sup> Quantitatively, that is 543,000 additional acre feet per year of deliveries south of the Delta.<sup>222</sup> Alternative 5's 6,000 cubic feet/second total diversion capacity is more than half of the existing SWP Banks pump (10,300 cfs) in the south Delta.<sup>223</sup> At max or near maximum capacity, the north Delta intakes could divert up to a third of the water in the Sacramento River.<sup>224</sup> A technical review of the DEIR by MBK Engineers submitted with comments of the SCWA demonstrates that much more water could be exported in total, due to the lack of limitations in the project description and information in DWR's own modeling.

The DEIR dismisses this substantial additional water supply as a growth inducing factor, insisting that it will simply stabilize SWP deliveries that have been curtailed in recent years due to pumping restrictions.<sup>225</sup> The DEIR attempts to de-link water supply and population growth, positing that SWP deliveries south of the Delta have varied over time while southern California population growth has been consistent.<sup>226</sup> This decoupling flies in the face of 21st century California water law that views urban development and water supply as going hand-in-hand. For example, SB 610 and SB 221, respectively, require Water Supply Assessments and Water Supply Verifications to ensure availability of water for large urban development projects.<sup>227</sup> These statutes are premised upon the notion that the subject developments cannot be constructed without a known water supply. The Urban Water Management Planning Act [Wat. Code, § 10610 et seq.] mandates the preparation of water supply plans based, in part, upon "projected population estimates".<sup>228</sup> As such, the UWMP Act equates population growth with new water demand.

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<sup>220</sup> See DEIR, Ch. 31.

<sup>221</sup> See DEIR, p. 6-43, Table 6-7. Even where the DEIR shows a 15% increase in SWP supplies based upon the long-term average baseline (Oct. 1921-Sept. 2015), the amount is still significant. (See DEIR, p. 31-8, Table 31-2; see also DEIR p. 6-41, Table 6-5.) The increase under this figure is still 541,000 AFY [4,050,000 - 3,509,000].

<sup>222</sup> See DEIR, p. 6-43, Table 6-7 [2,944 TAF (w/ Alt 5) - 2,401 TAF (existing)].

<sup>223</sup> DEIR, p. 6-13.

<sup>224</sup> DEIR, p. 3-155, Figure 3-37 [e.g., up to 5,000 cfs diverted in Oct.-Nov. with Sac River flows at 15,000 cfs].

<sup>225</sup> See DEIR, p. 31-9.

<sup>226</sup> DEIR, p. 31-3.

<sup>227</sup> See Wat. Code, § 10910 et seq.; Gov. Code, § 66473.7.

<sup>228</sup> Wat. Code, § 10631, subd. (a).

In *Vineyard Area Citizens For Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431, the California Supreme Court states:

“...CEQA’s informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to “evaluate the pros and cons of supplying the amount of water that the [project] will need.”<sup>229</sup>

While the *Vineyard* Court was concerned about the EIR’s accounting for the source(s) of water that would supply the proposed Sunrise Douglas master planned community, the DCP DEIR presents the inverse dilemma – accounting for where and how a massive new source of water will be applied. The core principle still applies – the EIR cannot “ignore or assume a solution to the problem” of generating 543,000 AFY or more of new water.

The variance in south-of-Delta SWP deliveries can be explained simply by the multiple supply options available to SWP exporters, including Colorado River water and local supplies. Indeed, SWP water accounts for about a third of the water supply for SWP contractors.<sup>230</sup> Moreover, fluctuations in SWP deliveries can further be explained based upon variance in rainfall from year-to-year. The DEIR’s rationale is sufficient only to show that SWP contractor areas can steadily grow without a consistent SWP supply. It does not, however, prove that the additional water that can and will be supplied as a result of the DCP is not growth inducing.

The DEIR goes on to take the position that population growth is not dependent upon water supply because water demands have decreased by about 20 percent over the past 19 years while population has increased.<sup>231</sup> DWR concedes that this is “partially” due to the success of water conservation efforts and programs.<sup>232</sup> The fact that California has achieved a level of water conservation success does not lead to the conclusion that new development does not rely upon new water. If SWP customers/contractors have coped with ESA-related curtailments in deliveries (see DEIR, pp. 1-18 to 1-19) through adoption of conservation efforts, as the DEIR suggests, the DEIR fails to sufficiently explain where the new 543,000 AFY or more will go and how it will be used. (The DEIR does not presume that SWP customers will abandon the conservation efforts/measures they have undertaken over the past 19 years, and which are mandated by State law.)

The DEIR “cheats” on its own baseline by taking the position that 543,000 AFY or more of new water will “restore previously contracted amounts.”<sup>233</sup> The DEIR’s own stated baseline existing condition for SWP south of Delta exports is 3,509,000 AFY or 2,401,000 AFY, depending upon whether you use Table 6-5 or 6-6, respectively.<sup>234</sup> Any water added to that baseline is new water that must be accounted for, even in general terms. The additional new water cannot simply disappear or merge into the baseline so as to minimize or negate the growth inducing impact.

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<sup>229</sup> *Ibid.*, quoting *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

<sup>230</sup> See Table 31-1.

<sup>231</sup> DEIR, p. 31-3.

<sup>232</sup> *Ibid.*

<sup>233</sup> DEIR, p. 31-9.

<sup>234</sup> DEIR, pp. 6-41 to 6-43.

Apart from the general identification of the four major SWP contractor service areas (see, e.g., Table 31-3), the DEIR does not attempt to explain or assess how the new water supply would be allocated towards growth patterns in those areas. The DEIR attempts to explain away the growth inducing potential of the DCP by noting that “neither the project nor any project alternative would include the expansion of the SWP and CVP service area.”<sup>235</sup> Consider, however, the sheer geographic scope of the SWP and CVP service areas (see DEIR, p. 1-10, Figure 1-3), which retain substantial undeveloped terrain for urban growth. It is nowhere near built out, including accounting for more dense urban development and redevelopment that is dictated and incentivized by local plans and State law. Consistent with California’s acknowledgement that water supply and population growth are inextricably intertwined, the DEIR needs to discern and disclose at a programmatic level where and how the 543,000 AFY of additional supply will be allocated. If the new supplies will truly be absorbed into existing regional planning efforts, the DEIR should incorporate general plan documents that reflect that planned growth.<sup>236</sup>

## **XI. THE DCP VIOLATES NUMEROUS LAWS ENACTED TO PROTECT THE DELTA AND AREAS WHERE WATER ORIGINATES**

Approval and implementation of the DCP as proposed would violate numerous laws enacted to protect the Delta and other areas where water originates. Those laws include the 1959 Delta Protection Act (Wat. Code, § 12200 et seq.), the 1992 Delta Protection Act (Pub. Resources Code, § 29700 et seq.), Water Code section 12980 et seq., the Watershed Protection Act (Wat. Code, § 11460 et seq.), Water Code section 1215 et seq. and the 2009 Delta Reform Act. These laws apply to both the SWP and Central Valley Project (CVP). Given that the CVP is presently not participating in the DCP, and the lack of necessary information in the DEIR project description and impact analyses, it is especially unclear how DWR could operate the DCP without violating these Delta protection laws, while also achieving project objectives and not harming CVP operations or water supplies, which is a concern to Sacramento County because the Sacramento County Water Agency holds a CVP contract for municipal and industrial water use.

### **A. The 1959 Delta Protection Act**

The 1959 Delta Protection Act (1) requires the SWP and the CVP to provide:

[S]alinity control and an adequate water supply for the Delta (Wat. Code, §§ 12201, 12202); (2) prohibits the export of water from the Delta to which in-Delta users are entitled, and water which is necessary for salinity control and an adequate supply “to maintain and expand agriculture, industry, urban and recreational development in the Delta” (Wat. Code, § 12204); (3) requires maintenance of a “common source of fresh water” in the Delta to serve both in-Delta water needs and export water needs when water surplus to the in-Delta needs is available (Wat. Code, § 12201); and (4) requires all releases of water from storage reservoirs into the Delta for export from the Delta to be integrated to the “maximum extent possible” in order to fulfill the objectives of the Act (Wat. Code, § 12205).

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<sup>235</sup> DEIR, p. 31-5.

<sup>236</sup> See *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 877 [lead agency water purveyor adequately addressed growth inducing impacts of water supply project by incorporating customer general plans].



The DCP conflicts with the 1959 Delta Protection Act in numerous respects, including the fact that the Project, by design, is intended to directly circumvent the maintenance and provision of that “common source of fresh water” (or “common pool”) by constructing intakes and tunnels in the northernmost tip of the Delta that enable DWR to divert and export substantial amounts of Sacramento River fresh water directly into the tunnels that would otherwise flow into that common pool in the absence of the tunnels. Such a bypass deprives essentially the entirety of the Delta of the common salinity control and other benefits mandated by the 1959 Delta Protection Act that such fresh water would provide if it flowed into the common pool before it was exported.

Moreover, DWR has a duty under Water Code section 12205 to integrate SWP and CVP releases of storage water into the Delta for export from the Delta “to the maximum extent possible” to fulfill the objective of maintaining that common pool and ensuring that it contains an adequate supply of suitable quality for in-Delta water users. Releasing water from storage reservoirs for diversion through the DCP for export out of the Delta, which entirely bypass that common pool, conflicts directly with that duty and would violate Water Code section 12205.

Water Code section 12204 further prevents the SWP and CVP from exporting any water from the Delta that is necessary to ensure that in-Delta water users at all times have an adequate water supply of suitable quality. The DCP will in many instances result in the export of water from the Delta that directly deprives in-Delta water users of that supply and quality. Examples of such instances include the planned deprivation of such water supply and quality via the export of Sacramento River fresh water through the tunnels, instead of allowing that fresh water to flow through and freshen the Delta before it is exported from the common pool in the event of extended droughts and in the event of individual or widespread levee failures and/or sea level rise which draw sea water into the Delta and impair the water quality of the common pool. In such instances, rather than allowing Sacramento River fresh water to flow into the common pool to maintain and re-freshen its water quality as mandated by the 1959 Delta Protection Act, the Project will enable and encourage the SWP and CVP, instead, to abandon the common pool and bypass it via the diversion of that fresh Sacramento River water through the tunnels.

## **B. The 1992 Delta Protection Act**

In the 1992 Delta Protection Act, the Legislature made numerous findings and declarations for the protection of the Delta, including the following set forth in Public Resources Code sections 29701 and 29702, respectively:

[T]he Sacramento-San Joaquin Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state to recognize, preserve, and protect those resources of the delta for the use and enjoyment of current and future generations.

[T]he basic goals of the state for the delta are the following: (b) Protect, maintain, and, where possible, enhance and restore the overall quality of the delta environment, including, but not limited to, agriculture, wildlife habitat, and recreational activities.

As is the case with the 2009 Delta Reform Act, which contains substantially similar findings and declarations, far from “preserv[ing],” “protect[ing],” “maintain[ing],” much less “enhancing” the Delta’s



“irreplaceable resources” and the “overall quality of the delta environment,” the DEIR confirms that the Project’s construction and operation will substantially impair, and in many cases permanently destroy, those resources and qualities, in direct contravention of the 1992 DPA.

**C. Water Code Section 12980 et seq.**

Similar to the 1992 DPA, in Water Code section 12981, subdivisions (a) and (b), respectively, the Legislature made the following findings and declarations:

[T]he delta is endowed with many invaluable and unique resources and that these resources are of major statewide significance.

[T]he delta’s uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, the physical characteristics of the delta should be preserved essentially in their present form; . . .

Implementation of the DCP would violate these provisions because far from “preserv[ing]” “the physical characteristics of the delta . . . in their present form; . . .,” the construction and operation of the Project’s massive tunnels, forebays, intakes, shafts and other facilities constitute an obvious and destructive alteration of the present physical characteristics of the Delta in direct contravention of these findings and declarations.

**D. The Watershed Protection Act and Water Code section 1215 et seq.**

Water Code section 11460 of the Watershed Protection Act provides:

In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

Water Code section 1216 similarly provides:

A protected area shall not be deprived directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of the inhabitants or property owners therein, by a water supplier exporting or intending to export water for use outside a protected area pursuant to applications to appropriate surface water filed, or groundwater appropriations initiated, after January 1, 1985, that are not subject to Section 11460.

The DCP as proposed would violate these mandates in many respects, and the DEIR does not establish that the construction or operation of the Project will not deprive the Delta or other areas of origin of their prior right to all of the water reasonably required to adequately supply their beneficial needs.

A transparent analysis would have revealed that there are not only many instances where the construction or operation of the Project will indeed result in such deprivations, but, as noted above with respect to the 1959 DPA, it is in fact one of the objectives of the Project to bring about such deprivations to the Delta area in events such as extended droughts, individual or widespread levee failures, and sea level rise. One of the express objectives and purposes of the Project is to allow the SWP and CVP in such events to divert fresh water from the Sacramento River directly into the tunnels, thereby directly depriving the Delta area of its prior right to have that water flow into and through the Delta to meet its beneficial needs.

Apart from such events, the Project's projected adverse impacts to surface and groundwater quality and quantity within the Delta and other areas of origin during the construction and operation of the Project likewise result in direct and/or indirect deprivations of those areas' prior rights to that water and to the unimpaired quality of that water in violation of Water Code section 11460 and/or 1216.

#### **E. The Delta Reform Act of 2009**

The 2009 Delta Reform Act provides comprehensive protections for the Delta. The DCP as proposed violates the DRA in numerous substantial respects.

The Delta Reform Act defines the coequal goals of Delta water management as “the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.”<sup>237</sup>

The DCP as proposed directly conflicts with the Delta Reform Act's co-equal goal of protecting, restoring, and enhancing the Delta ecosystem. The Project simply relocates impacts from the export of Delta water to a new area of the Delta and includes no protective, restoration or enhancement measures in excess of mitigation required to reduce project impacts pursuant to CEQA and other laws, and, as described herein, even those measures are themselves legally and practically deficient.

The DCP also conflicts directly with the Delta Reform Act's requirement that Delta water be managed in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta.<sup>238</sup> The Project would instead cripple the Delta's sustainable and wildlife-friendly agricultural operations, destroy special status species Delta habitat in and out of the water, and plague the Project area, including the historic Delta communities and cultural landscape with overwhelming and lengthy construction activity. Project operations would impair currently reliable local surface and groundwater supplies and, eventually, the Delta communities that depend on those supplies.

The DEIR also fails to actually analyze consistency of the Project with the State Plan of Flood Control as required by the 2009 Delta Reform Act, which requires that Project studies include “the potential effects on

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<sup>237</sup> Wat. Code, § 85054.

<sup>238</sup> Wat. Code, § 85054.

Sacramento River and San Joaquin River flood management.”<sup>239</sup> Contrary to this requirement, the DEIR examines flood protection on the Sacramento River between the American confluence and Sutter Slough, but nowhere else. Moreover, while the DEIR states on p. 7-27: “the preference and consistency with regulatory requirements for SPFC levees and CVFPB’s jurisdiction would be followed, including the consistency with the CVFPP,” there is no analysis to demonstrate how such regulatory requirements would be implemented, and what the implications for Project design or associated environmental effects would be.

The DEIR fails to adequately analyze the Project’s likely detrimental effects on Delta levees and flood control infrastructure and operations, as discussed in section IX.a.

The Project does not use best available science as defined by the Delta Reform Act’s implementing regulations.<sup>240</sup> For example, the Project’s analysis uses outdated, extreme, completely improbable assumptions about sea level rise (SLR) and fails to account for the consequences of SLR (including levee overtopping) in its analysis of project impacts. It also relies on incorrect and irrelevant analyses of residence time, thus reaching unsupported conclusions about the Project’s potential to increase harmful algal blooms and affect public health and water supply security in the Delta.

In the Delta Reform Act, the Legislature declared State policy, in pertinent part, as follows: “The policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency . . . .”<sup>241</sup>

Despite this policy and the DRA regulations that require such reduced reliance (Cal. Code Regs., tit. 23, § 5003), the Project does precisely the opposite. The DCP directly conflicts with the policy of reduced reliance because it would export growth inducing water supplies from the Delta that *increase*—rather than *decrease*—reliance on the Delta to meet present and future water supply needs outside the Delta. In addition to increasing reliance on Delta water, the Project will also divert funding from projects that would promote reduced reliance on Delta water. The participating water contractor agencies will incur additional financial obligations through their SWP contract charges, and possibly also bond debt, to finance Project construction. Incurring this increased public debt will impair the ability of water contractor agencies to secure funds for other water projects that improve regional water self-reliance without relying on the Delta. The DEIR fails to adequately disclose and analyze the full nature and extent to which the Project will directly and indirectly increase reliance upon the Delta, nor does it identify and analyze measures to mitigate or avoid that increase in reliance upon the Delta.

Under Delta Reform Act regulations, no project implemented in the Delta may impair future potential for implementation of habitat restorations.<sup>242</sup> Operation of the Project, if implemented, would significantly degrade water quality, thereby impairing or precluding development of other habitat restoration projects.

“Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county

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<sup>239</sup> Wat. Code, § 85320, subd. (b)(2)(E).

<sup>240</sup> See Cal. Code Regs., tit. 23, § 5001, subd. (f), Appendix 1A; see also Wat. Code, §§ 85302, subd. (g), 85308.

<sup>241</sup> Wat. Code, § 85021.

<sup>242</sup> Cal. Code Regs., tit. 23, § 5007.

general plans for their jurisdictions or spheres of influence when feasible[.]”<sup>230</sup> The siting of this Project will conflict with numerous uses in Sacramento County, by conversion of County-designated agricultural land and disruption of agricultural operations, adverse aesthetic (visual, noise) and access effects to established visitor serving businesses, historic resources local communities. DWR has not shown that it is infeasible to avoid these conflicts, by adopting a through Delta conveyance alternatives. For this and other reasons, the Project fails to avoid or reduce conflicts with existing uses.

## XII. CONCLUSION

It is well established that “the purpose of an EIR is not only to protect the environment but to demonstrate to the public that it is being protected.”<sup>231</sup> As explained throughout these comments, the DEIR does not provide sufficient information, nor does it present information in a way that allows the public a meaningful opportunity to understand and comment on the Project’s substantial adverse impacts. The DEIR has failed to demonstrate that the Delta’s unique communities and important environmental resources will be protected from the significant impacts of constructing and operating the Project.

The residents and businesses of Sacramento County deserve to take an active part in evaluating such a monumental undertaking that is sure to have substantial and lasting effects on their lives. The DEIR, despite its volume, fails to provide meaningful information or to present information in a way that adequately informs the public of the DCP’s many significant impacts. It is so “fundamentally and basically inadequate and conclusory in nature” that public comment is essentially meaningless.<sup>232</sup> The failure to provide sufficient information about the Project or credible evidence and objective analysis to support the DEIR’s impact determinations has deprived the public of a meaningful opportunity to understand and comment on the project’s substantial adverse impacts. Correcting these errors will require the addition of significant new information and, thus, the DEIR must be revised and recirculated for public review.<sup>233</sup>

Respectfully submitted on behalf of the Sacramento  
County Board of Supervisors,



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Don Notolli, Chair  
County of Sacramento  
Board of Supervisors

### Enclosures:

Exhibit A: Fish Facilities Technical Team Technical Memorandum, July 2011

Exhibit B: BDCP Phased Construction Workshop Summary, Five Agency Proposal Agreement, October 2011

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<sup>230</sup> Cal. Code Regs., tit. 23, § 5011.

<sup>231</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>232</sup> *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112; 14 Cal. Code Regs, § 15088.5(a); *Mountain Lion Coalition v. Fish and Game Comm’n* (1989) 214 Cal.App.3d 1043.

<sup>233</sup> 14 Cal. Code Regs, § 15088.5, subd. (a).

# Exhibit 3



SACRAMENTO COUNTY  
**WATER AGENCY**

December 16, 2022

***Via Electronic Mail Only***

Department of Water Resources  
Attention: Delta Conveyance Office  
P.O. Box 942836  
Sacramento, CA 94236-0001  
[deltaconveyancecomments@water.ca.gov](mailto:deltaconveyancecomments@water.ca.gov)

Re: Sacramento County Water Agency Comments on Delta Conveyance Project  
Draft Environmental Impact Report (SCH No. 2020010227)

To the Delta Conveyance Office:

Sacramento County Water Agency (SCWA) submits these comments on the Department of Water Resources' (DWR) draft environmental impact report (Draft EIR) prepared for the proposed Delta Conveyance Project ("DCP" or "Project").

**I. Background**

SCWA currently supplies potable and recycled groundwater and surface water to approximately 150,000 persons through more than 49,000 residential and business connections throughout its Zone 40 service area. SCWA's service area also includes the major growth areas of Sacramento County, south of Jackson Highway and east of State Route 99, which are anticipated to accommodate roughly 100,000 new persons and more than 20,000 new connections by buildout. SCWA's diverse surface water supply portfolio, combined with its conjunctive management of groundwater resources, provide stable and reliable water supplies to meet SCWA's current and future water demands.

In 2002, SCWA, in conjunction with East Bay Municipal Utility District (EBMUD), formed the Freeport Regional Water Authority (FRWA). The FRWA was created to guide the financing, ownership, development, construction, and operation of the Freeport Regional Water Project (FRWP). The FRWP is a cooperative effort of SCWA and EBMUD to supply surface water from the Sacramento River to customers in central Sacramento County and the East Bay area of California via a water intake facility and pumping plant on the Sacramento River at the Freeport Bend, approximately 10 miles south of downtown Sacramento. SCWA relies on the FRWP facilities to provide surface water supplies and fulfill SCWA's conjunctive use program. The FRWP consists of: (1) an intake and pump station near Freeport Bend; (2) pipelines extending from the intake to SCWA's Vineyard Surface Water



Treatment Plant and to the Folsom South Canal; (3) a pipeline extending from the Folsom South Canal terminus to EBMUD's Mokelumne River Aqueduct; and (4) related pumping plants, terminal facilities, and water treatment facilities. The FRWP intake can divert 185 million gallons per day (MGD), of which 85 MGD is dedicated to SCWA and 100 MGD to EBMUD. SCWA has invested in multiple sources of surface water to divert through FRWA at the FRWP, to supplement groundwater and maintain a diverse and reliable water supply portfolio for SCWA customers. Currently, SCWA diverts water at the FRWP intake under appropriative water rights, contract rights for Central Valley Project (CVP) water, and a contract for delivery of remediated groundwater.

The FRWP intake, located at Sacramento River Mile 47.1, can be impacted by the Sacramento Regional Wastewater Treatment Plant's (SRWTP) treated wastewater discharge located downstream at Sacramento River Mile 46. "Reverse flows" predictably occur on the Sacramento River during periods of high tides on the San Francisco Bay and low downstream flows in the river. To avoid water quality impacts to the FRWP, FRWA halts diversions at the FRWP intake when SRWTP wastewater effluent has traveled 0.9 miles upstream from its discharge point during reverse flow events. These intake shutdowns are required by the domestic water supply permits issued by the State Water Resources Control Board (SWRCB) Division of Drinking Water to SCWA and EBMUD. The FRWP resumes operation only after the river resumes flowing in the downstream direction and the effluent zone has moved back downstream to a location not more than 0.7 miles upstream from the SRWTP discharge point.

The location and operation of the Project's intakes present the potential for significant adverse impacts to operation of the FRWP from reverse flow events in the Sacramento River, and to the Sacramento region's water supply, through impacts to surface and groundwater quality and availability (including groundwater levels during construction and operation in the Project area and South American Subbasin [SASb]) and changes in upstream reservoir operations and in river flows in the Delta and upstream tributaries. The comments contained herein address the technical and legal insufficiency of the Draft EIR, including DWR's analysis of Project impacts on SCWA's water supplies and to water users in Sacramento County.

## **II. Purpose and Project Objectives (Chapter 2)**

The Purpose and Project Objectives (Draft EIR, ch. 2) are too narrowly drawn, focusing only on benefits to State Water Project (SWP) operations and south of Delta water deliveries. The objectives reference providing "operational flexibility to improve aquatic conditions in the Delta," but the Project does not commit to improving aquatic conditions, nor does it include any objectives that would protect water supplies for water users in and upstream of the Delta. Framing Project objectives so narrowly discourages consideration of alternatives to the Project that would protect and restore the Delta environment and thus is inconsistent with the California Environmental Quality Act (CEQA) as well as with the Delta Reform Act's *coequal* goals of improving water supply reliability *and* protecting, restoring, and enhancing the Delta ecosystem, as well as the Legislature's directive that "coequal goals

To the Delta Conveyance Office

Re: SCWA Comments on the Delta Conveyance Project Draft EIR (SCH No. 2020010227)

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shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Wat. Code, § 85054.) The Project objectives should be expanded to include prevention of water quality degradation in the Delta and avoidance of adverse impacts to water users in and north of the Delta, including impacts to Delta public facilities (which would include the FRWP), consistent with the Delta Plan.

### III. Proposed Project and Alternatives (Chapter 3)

The Draft EIR examines the Dual Conveyance Bethany Reservoir Alignment as the proposed Project (Alternative 5). Alternative 5 is analyzed in the Draft EIR at 6,000 cubic feet per second (cfs) capacity, but the Draft EIR states without justification that DWR is not precluded “from approving [the Project] with another operational capacity, should DWR choose to do so.” (Draft EIR, p. 3A-46:7-8.) DWR does not have unfettered discretion to adopt a Project alternative that has not been considered in sufficient detail to allow reviewers to evaluate its comparative merits. (Cal. Code Regs., tit. 14, §§ 15151, 15126.6(d).) Approval of Alternative 5 at, for example, an operational capacity *above* 6,000 cfs is not supported by findings or evidence in the record. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 470 [citing Pub. Resources Code, § 211698.5].) Importantly, flow in the Sacramento River measured at Freeport is as little as 9,000 cfs and averages 11,000 cfs in the late summer/early fall months. The Draft EIR contains no evidence regarding environmental consequences of the proposed Project operated at a capacity other than 6,000 cfs, including effects to reverse flows, and groundwater resources. (Pub. Resources Code, § 21081.5; Cal. Code Regs., tit. 14, § 15384.)

Moreover, there is no evidence supporting DWR’s two-level filtering criteria for the consideration of feasible alternatives to the proposed Project. (Pub. Resources Code, § 21081.5; Cal. Code Regs., tit. 14, § 15384.) DWR’s filtering criteria improperly eliminate alternative configurations of “through-Delta conveyance with no new diversion facilities” for failing to meet two or more resiliency criteria. (Draft EIR, pp. 3-5 – 3-6.) However, the Draft EIR alternative filtering criteria fail to take into consideration whether or how improving levees to existing standards for flood protection could achieve resiliency objectives without the need for north Delta intake structures. (*Ibid.*; Pub. Resources Code, § 21091(d)(1); Cal. Code Regs., tit. 14, § 15126.6(c) [a reasonable range of potential alternatives includes “those that could feasibly accomplish most of basic objectives of the Project and could avoid or substantially lessen one or more of the significant effects”].)

The County of Sacramento prepared a flood risk reduction study<sup>1</sup> for the town of Hood describing the fragility of the existing levee system and providing flood-risk management and implementation recommendations. The County’s study demonstrates that

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<sup>1</sup> Attached hereto as Exhibit 1. Available at <https://waterresources.saccounty.gov/DeltaSmallCommunities/Pages/Hood-Feasibility-Study.aspx> (last visited Dec. 9, 2022).

conveying water within the Sacramento River with appropriate levee improvements could eliminate the need for a tunnel intake upriver of Walnut Grove and could reduce the proposed Project tunnel length by approximately 10 miles, thus reducing or avoiding many of the Project’s significant impacts, including those associated with reverse flows, impacts to the town of Hood municipal wells, effects to historic Delta towns and cultural resources, the Stone Lakes National Wildlife Refuge, and Cosumnes River Preserve. In Appendix 3A to the Draft EIR, “Identification of Water Conveyance Alternatives,” DWR concludes the proposed Project intake locations “require the shortest intake structures” and so “minimize conflicts with existing land uses and residential structures.” (Draft EIR, p. 3A-4.) The proposed intake locations present massive unavoidable conflicts with existing land uses and residences, including quality of life for Delta residents, and the statement that conflicts would be “minimized” is clearly fallacious. Levee improvements on the Sacramento River could be far more effective in minimizing impacts to existing land uses and structures compared to the proposed Project, including through shorter construction time and no permanent impacts. (See *id.*, p. 3A-26.) Because the current range of alternatives does not adequately address any of the Project’s significant impacts in Sacramento County, DWR must conduct further review of alternative categories—including through-Delta conveyances with no new diversion facilities—with consideration of Sacramento River levee improvements.

#### **IV. Environmental Impacts**

As described below, the Draft EIR is legally inadequate in its analysis and determinations regarding the proposed Project’s significant environmental impacts and so fails as an informational document.<sup>2</sup> The EIR must be revised and recirculated to correct the identified deficiencies.

##### **A. Surface Water (Chapter 5)**

##### **1. Reduction in Upstream Sacramento River Flows**

The Draft EIR inappropriately concludes that changes to surface water resources “by themselves, are not considered an impact under CEQA and thus are not evaluated as impacts” in the Draft EIR. (Draft EIR, pp. 5-1:4-6, 5-2:31.) Under CEQA, “[t]he purpose of an environmental impact report is to identify the significant effects on the environment of a project . . . .” (Pub. Resources Code, § 21002.1; Cal. Code Regs., tit. 14, § 15064(d) [a lead agency must consider “physical changes in the environment which may be caused by the project”].) A “project-specific effect” is any direct or indirect environmental effect of a project other than cumulative effects and growth inducing effects. (Pub. Resources Code, § 21065.3; Cal. Code Regs., tit. 14, § 15191(j).) “Direct” and “indirect” effects “are caused by the project . . . .” (Cal. Code Regs., tit. 14, § 15358(a)(1)-(2).)

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<sup>2</sup> The Draft EIR is deficient in numerous areas. SCWA’s comments focus on impacts directly related to water supply and groundwater resources.

The Draft EIR provides only “[a] description of potential changes to surface water resources,” despite acknowledging that such changes “could occur to surface waters *as a result of* the operation of new diversion and conveyance facilities for the SWP and, potentially, the CVP identified in the project alternatives.” (Draft EIR, p. 5-1:24-25, emphasis added.) In fact, the Draft EIR concedes that there are direct changes on the physical environment resulting from Project operations:

[T]here are consistent decreases among project alternatives in long-term average flows for all months on the Sacramento River north of Courtland (i.e., downstream of the proposed north Delta intakes) due to the diversions of available excess water at the proposed north Delta intakes beyond the needs to satisfy downstream regulatory requirements in the Delta, including Delta outflows and south-of-Delta exports.

(Draft EIR, p. 5-2:2-6; see Tables 5C-36-5C-42.)

Impacts to surface water resources directly resulting from operation of the proposed Project and alternatives must be analyzed in the Draft EIR. (Cal. Code. Regs., tit. 14, § 15121; *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9 [holding that an EIR inappropriately “remove[d] from consideration those matters necessary to the assessment of whether the [Project] purpose can be achieved”].) DWR must adequately analyze the potential environmental effects of the proposed Project to inform public agency decision-makers and the public generally of the potential effects of lower water levels on the environment.

## 2. Reverse Flows

The Draft EIR does not adequately identify, analyze, and avoid or mitigate the Project’s potential impact on the FRWP intake facility and SCWA water supply as a result of increased reverse flow events. An increase in the frequency of reverse flow events would result in an increase in the frequency of controlled shutdowns of the FRWP on the Sacramento River. Shutdowns of the FRWP intakes critically impact SCWA’s ability to supply water to its customers during drought periods.

The Draft EIR includes that operation of the DCP has the potential to increase the frequency of reverse flows in the Sacramento River upstream of the proposed intakes. (Draft EIR, p. 5-25:10-15.) However, the Draft EIR has no meaningful discussion of the Project’s potential to impact reverse flow events in the Delta, nor does it describe its analysis of these Project impacts. The Draft EIR in several locations recognizes the Project’s potential to increase the frequency of reverse flows upstream of the SRWTP intakes but offers only a cursory explanation of its conclusion that effects would not be significant:

[DWR] determined the frequency of reverse flows in the Sacramento River upstream of the proposed intakes, near the Sacramento Regional

Wastewater Treatment Plant, would increase slightly when the intakes were operating. The reverse flows attributable to these operations are very small in both duration and reverse flow distance. According to DSM2 results, there is no increase in frequency of stronger reverse flow events (reverse flow distance greater than 0.8 miles).<sup>3</sup>

(Draft EIR, p. 5-25:9-18.) Later, the Draft EIR similarly states: “[o]peration of the intakes could result in reverse flows in the Sacramento River.” (*Id.* at p. 21-40.) The Draft EIR provides no report or information by which to evaluate the basis for these statements nor the adequacy of its analysis of reverse flow events resulting from the Project. SCWA could not identify any information that would support the conclusion quoted above.

Because DWR has not provided any information about the number or duration of reverse flow events for the no-action alternative and for each of the modeled alternatives, nor has it presented its analysis in the form of figures that would allow a quantitative assessment of the number and duration of reverse flow events for each of the model simulations, it is not possible for SCWA to discern the effect on the FRWP. Further, because DWR has not presented details of its analyses for the Project alternatives, it is not possible for SCWA to ascertain whether the number and duration of reverse flow events would be similar for each of the Project alternatives.

CEQA requires that an EIR “be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.” (Cal. Code Regs., tit. 14, § 15151.) An EIR that does not provide information that would allow those not involved in its preparation to evaluate the adequacy of its conclusions violates CEQA. Conclusory comments in support of environmental conclusions are generally inappropriate. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 404.) “To facilitate CEQA’s informational role, the EIR must contain facts and analysis, not just the agency’s bare conclusions or opinions.” (*Id.* at p. 405, quoting *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.) SCWA could identify no evidence in the Draft EIR that DWR evaluated the frequency and duration of reverse flow events for the future (2040) climate change condition. The Draft EIR presents no analysis of the number of reverse flow events in the 2040 no-project scenario, or whether the DCP project operations would increase the frequency or duration of reverse flow events in future conditions. (Draft EIR, p. 4.)

Furthermore, though the Draft EIR concluded that the DCP’s potential to increase the frequency of reverse flow events will not result in any significant impacts, it states that tidal restoration efforts will be undertaken as mitigation to offset effects of reverse flows caused by

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<sup>3</sup> It should be noted that this brief discussion is found in chapter 5, Surface Water, under a section labeled “No Project Alternative,” which purportedly assesses future conditions if the Project does not proceed. Instead, however, this section discusses effects resulting from Project operations.



Project diversions. (Draft EIR, p. 3-158:33-34, fn. 11 [measures are designed to address fish impacts at Georgiana slough].) Coupled with the lack of substantial evidence supporting its conclusion that reverse flow impacts will not be significant, this statement—which acknowledges the DCP’s potential to cause an increase in reverse flow events—appears to recognize that the Project’s effects on reverse flows will be significant enough to require mitigation. The Draft EIR must be revised to include a robust, cohesive analysis of the DCP’s potential to increase the frequency of reverse flow events in the Sacramento River and the effects of such flows on the FRWA’s ability to divert water (both the time and quantity of any reductions in water supply availability), including the evidence supporting the analysis, and must include adequate and enforceable mitigation measures that will reduce impacts to levels less than significant.

DWR must revise the Draft EIR to address potentially significant impacts on the FRWP intake facility and SCWA’s water supply as a result of increased reverse flow events. In doing so, DWR should consider expert evidence submitted in the WaterFix water rights change petition hearing by SCWA, EBMUD, and other stakeholders.<sup>4</sup> SCWA also refers DWR to the comments of EBMUD on the Draft EIR. This information is essential to understand and draw meaningful conclusions about the Project’s effects on the environment and water supplies in the Sacramento Valley and American River watershed. Currently, the Draft EIR improperly declines to acknowledge the practical effect of water supply changes that will have real impacts on municipal, agricultural, domestic, and commercial users. CEQA requires that the Draft EIR properly evaluate and disclose these impacts.

### **3. Project Description and Operations Modeling**

The Draft EIR relies on hydrologic modeling to support its determinations about numerous impacts. However, the modeled parameters are not discussed in the Draft EIR and, importantly, the Draft EIR Project description does not limit DCP operations to what was modeled. The Draft EIR does not provide an actual operations plan that establishes concrete, stable parameters for use of the proposed north Delta intakes. Specifically, Alternative 5 does not describe how much water will be diverted at the north Delta diversion (NDD) and south Delta intakes and the timing of such diversions. As described in detail in the attached technical memorandum by MBK Engineers (attached hereto as Exhibit 4), who have specific expertise in the coordinated SWP and CVP operations, there is insufficient information in the Draft EIR to understand the full range of potential Project operations and, thus, the effects on surface water, and water supplies for water users in and north of the Delta, including water quality, of the Project’s use of NDD facilities. These inadequacies in the Draft EIR are of particular concern to SCWA, as a holder of a CVP contract, because the manner in which

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<sup>4</sup> Specifically, SCWA refers DWR to the testimony of Dr. Benjamin S. Bray contained in EBMUD-152 (attached hereto as Exhibit 2) and the testimony of Forest Williams contained in SCWA-3 (attached hereto as Exhibit 3).



DWR operates the Project may affect storage in upstream reservoirs, as well as water supplies and the environment north of the Delta.

According to MBK, problems with the Draft EIR relevant to upstream water supply impacts and Delta salinity impacts, relate to three main areas: (1) modeling constraints on Delta exports; (2) model assumptions on shared benefits and the obligations of the SWP and CVP; and (3) the modeling limits on release and re-diversion of stored water. As discussed further below, MBK made the following key observations:

- (1) The proposed north Delta diversion (“NDD”) facilities increase the capacity to release stored water for exports.
- (2) The modeling artificially limits the export capacity of the Project by including operational rules that result in months when simulated diversions through the proposed north Delta intakes are not used in their potential in combination with the existing south Delta pumps, even when the bypass flow requirements included in the project description would allow greater diversion.
- (3) Nothing in the Draft EIR project description would prevent DWR from using the NDD facilities to move additional stored water from the SWP and CVP.
- (4) The Draft EIR does not explicitly evaluate the additional water cost for complying with D-1641 standards that are shared by the CVP and SWP through the Coordinated Operations Agreement between Reclamation and DWR (COA), caused by increases in Delta export.

**a. Modeling Constraints on Delta Exports**

The preferred alternative (Alternative 5) does not maximize the use of the NDD when the Delta is in an excess but constrained condition. Excess but constrained conditions occur under current operations when regulatory requirements restrict the CVP’s and SWP’s ability to export water from the Delta, resulting in Delta outflow in excess of what is required to meet outflow and water quality requirements. Regulatory requirements, such as limits on reverse flows in Old and Middle River (OMR), are a common cause of excess but constrained conditions because the requirements limit exports at existing pumping facilities in the South Delta. The DCP is intended to divert Delta outflow in excess of the minimum required Delta outflow (MRDO) by diverting water at the NDD. Using the NDD rather than the existing south Delta diversion (SDD) when the Delta is in an excess but constrained condition could increase exports for both the CVP and SWP because NDD are not always constrained by excess but constrained conditions.

Draft EIR appendix 05A, section B, page B-63 states that “[t]he operation rules could result in months when simulated diversions through the proposed north Delta intakes are not maximized, even when the bypass flow requirements would allow greater diversions.” The

Draft EIR does not describe or demonstrate when these conditions occur in the modeling, how frequently use of NDD facilities are limited, nor why NDD operations are not maximized. The Draft EIR does not identify whether the modeled operational rules are intended to become actual operational requirements if the DCP is constructed. This issue must be clarified so that the public and decision-makers can understand the Project proposed for approval and whether the Draft EIR has adequately addressed the full range of potential operations and Project effects.

In an appendix, the Draft EIR states “[s]hifting of exports from the south Delta intakes to the proposed north Delta intakes only occurs when there is an operational advantage to doing so in terms of carriage water savings.” (See Draft EIR, appen. 5A, § B, at B-63.) The Draft EIR does not describe the operational criteria for this shift, the volume of this shift, or when it occurs. The Draft EIR does not state if this criterion would be discretionary; if it is discretionary, DWR has not modeled an alternative that would demonstrate the maximum use of the NDD. Therefore, benefits and impacts of the NDD may be understated in the Draft EIR. Indeed, carriage water savings would provide an incentive to prioritize use of the NDD, with further impacts to salinity and the requirement for additional releases from upstream CVP reservoirs.

Alternative 5 prioritizes SDD. DWR prepared a sensitivity analysis that prioritizes NDD; however, there is no alternative that maximizes combined NDD and SDD use allowable under current regulatory requirements, operating agreements, and proposed DCP operations. It is reasonable to assume that DWR would prioritize use of the NDD to convey as much water as possible through the proposed facilities when carryover storage is high. As a result, the potential effects of maximum allowed exports with the DCP have not been analyzed. Operating the DCP to maximize releases of stored water in wetter years would impact upstream water supplies, water users, and the environment, particularly in subsequent dry years, such as was experienced in 2022.

**b. Model Assumptions on Shared Benefits and the Obligations of the SWP and CVP**

The DCP and NDD increase total SWP/CVP diversions from the Delta. Increases in total diversions from the Delta, and the corresponding decreases in Delta outflow, will increase Delta salinity and may result in greater Delta outflow required to meet salinity requirements in future months. CalSim 3 modeling of the preferred alternative shows MRDO needed to meet standards contained in SWRCB Decision 1641 (D-1641)<sup>5</sup> increases an average of 40 thousand acre-feet (TAF) per year in DCP Alternative 5 when compared to

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<sup>5</sup> D-1641 is the implementation plan for the 1995 Bay-Delta Water Quality Control Plan, with respect to the operation of water projects within the Delta watershed. D-1641 includes water right permit terms and conditions to implement water quality objectives to protect Municipal and Industrial (M&I) beneficial uses in the Delta, as well as water quality objectives to protect Fish and Wildlife beneficial uses. D-1641 contains flow and water quality objectives that must be measured at various compliance monitoring stations throughout the Delta.

existing conditions. MRDO is a shared obligation of the SWP and CVP under the COA for the projects.<sup>6</sup> An increase in MRDO increases the obligation on both projects and can be a risk to water users of both the SWP and CVP as increased obligations would be met either by reductions in water deliveries or increased releases from SWP and CVP reservoirs.

Modeling results show migration of X2<sup>7</sup> inland in almost every month of the CalSim 3 simulation; this eastward movement of X2, due to increases in Delta exports, demonstrates that the Project is causing the salinity field to move eastward and increasing salinity in the Delta. Any resulting changes in MRDO associated with the Project-induced increased salinity in the Delta would be shared by the SWP and CVP under COA and result in additional water supply risk to water users of both projects.

Conversely, the use of the NDD can also reduce carriage water, or the water needed for Delta outflow to maintain Delta salinity standards for a given rate of Delta exports. DCP modeling shows a reduction in carriage water costs and shares this water savings between both the SWP and CVP. The Draft EIR states in appendix 05A, section B, page B-63 that “[c]arriage water benefits of these operations are split between the SWP and CVP according to COA, with priority placed on exporting this water. Any carriage water savings that cannot be exported are backed up into north of Delta storage.” The Draft EIR does not describe if this is an intended or incidental benefit that is shared with the CVP. The modeling shows a carriage water savings and an increase in the water cost of meeting X2 and salinity requirements that are shared with the CVP. But the Draft EIR does not adequately evaluate the additional water costs associated with increases in X2, salinity requirements, and the carriage water savings, including the frequency and conditions when each effect could occur. Additionally, the increased MRDO may lead to increased instances of Term 91 by increasing presence of supplemental water as defined in SWRCB Water Right Order 81-15, which would result in loss of access to water supply for water users whose water right permits contain this restriction.

**c. Modeling Limits on Release and Re-diversion of Stored Water**

Release and conveyance of SWP stored water from Oroville reservoir is constrained in the Draft EIR’s modeling of the preferred alternative by criteria that are inconsistent with existing SWP operations. Current SWP operational objectives allocate and move stored water with available SDD capacity until Oroville carryover storage is 1.6 million acre-feet (MAF). This operation is simulated as part of the existing conditions in the Draft EIR modeling. The DCP provides additional capacity for the SWP to export water from the Delta, and when

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<sup>6</sup> Agreement Between the United States of America and the State of California for Coordinated Operation of the Central Valley Project and the State Water Project.

<sup>7</sup> X2 is the location of the 2 parts per thousand salinity contour (isohaline), one meter off the bottom of the estuary, as measured in kilometers upstream from the Golden Gate Bridge. The abundance of several estuarine species has been correlated with X2.

combined with current SWP operations, could result in more frequently drawing carryover storage in Oroville down to 1.6 MAF. However, modeling of the preferred alternative does not fully utilize the additional capacity provided by the DCP to move stored water when Oroville carryover is greater than 1.6 MAF. Although there is additional release and conveyance of stored water from Oroville in modeling of the preferred alternative, it is limited in the modeling to a greater extent than described in the Draft EIR Project description. There are no operating criteria described in the Draft EIR that prevent exports of stored water through NDD, and the effects of utilizing the additional capacity provided by the DCP to convey additional stored water were not evaluated. Increases in release of stored water from Oroville may result in lower storage in dry and critical years and be a risk to the CVP storage in Shasta and Folsom reservoirs if Oroville storage is not adequate to meet the shared obligations of both projects.

Further, the Draft EIR in appendix 05A, section B, page B-63 states that “for the SWP only, releases of up to 100 TAF/year can be made from Lake Oroville in wetter years for diversion at the north Delta intakes from July through September.” This operating criterion is not a component of the Project description, but rather an assumption used for modeling purposes. It is unclear whether the modeled operational rule is intended to become actual operational requirements if the DCP is constructed. Revisions to the Draft EIR are necessary to inform the public and decision-makers whether the description of DCP alternatives fully covers the full range of foreseeable operations.

In sum, the Draft EIR does not describe in sufficient detail how much water will be diverted at the NDD and SDD and the timing of such diversions. As a result, the full effects of the proposed Project cannot be ascertained.

The Draft EIR is also vague and inconsistent in its description of DCP operations. The Project description states “[s]hifting from south Delta intakes to proposed north Delta intakes has trade-offs and is not expected unless there is an operational advantage to do so at DWR’s discretion under limited circumstances (e.g., to provide additional real-time south Delta fish protections, to reduce salinity at Jersey Point).” (Draft EIR, p. 3-145.) The set of “limited circumstances” is not defined or enumerated to clarify when and how the NDD intakes might be operated. Moreover, the description of circumstances appears inconsistent with the Draft EIR’s description of how operations were modeled for purposes of environmental review. (See Draft EIR, appen. 05A, § B, p. B-63 [“Shifting of exports from the south Delta intakes to the proposed north Delta intakes only occurs when there is an operational advantage to doing so in terms of carriage water savings.”].) Thus, it is unclear whether the Draft EIR modeling supports the description of Project operations.

There are several reasonably foreseeable situations in which exports might be shifted from the south Delta to the north Delta, in addition to the benefits of additional carriage water savings that the Draft EIR modeling appendix describes as the only situation evaluated in the Draft EIR modeling. Most notably, DCP creates the ability to move available additional stored water for which there will be a strong demand south of the Delta, including for

municipal and agricultural use, as well as potential groundwater recharge projects to achieve sustainability pursuant to the Sustainable Groundwater Management Act. Although the Draft EIR shows that modeled total exports increase by an annual average of 588 TAF in Alternative 5 relative to the existing conditions, the Draft EIR does not disclose that there is still significant unused modeled export capacity in Alternative 5. It is reasonable to assume that with the DCP, DWR would convey as much water as possible given regulatory restrictions when carryover over storage is high enough. Impacts to upstream water supplies, water users and the environment can occur when more water is conveyed with the DCP in wetter years and results in lower storage going into following dry years. This may happen in 10 percent of years with the DCP. Since the Project description contains no criteria limiting movement of stored water in wetter years, and based on SWP operating guidelines and pressure from Project investors seeking to maximize their return on investment, DWR is likely to do so, the Draft EIR should assess the effects of the movement of that additional stored water.

Because the Draft EIR does not disclose the potential use of that additional capacity to maximize release of stored water under the DCP, it fails to identify and inform the public and decision-makers of potential redirected impacts to CVP water supply that in turn could impact groundwater supplies, salinity, subsidence, aquatic resources, terrestrial species, and agricultural resources in the Delta and upstream of the NDD. For example, low water levels in CVP reservoirs may need to be replenished by smaller, upstream reservoirs.<sup>8</sup> Moreover, scientific and factual data support the conclusion that reduced water supplies will impact wildlife and north of Delta water users. (Cal. Code Regs., tit. 14, § 15064(b)(1).) Diminishing wetlands and fallow rice farms along the Sacramento River eliminate necessary bird habitat, which results in poor breeding seasons and mortality during migration.<sup>9</sup> Diminished reservoir flows also affect the viability of endangered Chinook salmon in the Sacramento River.<sup>10</sup> The Project could exacerbate these impacts if, as stated, it results in reduced water supplies on the Sacramento River. DWR failed to analyze these potential impacts as required pursuant to CEQA.

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<sup>8</sup> See Rachel Ramirez, *The Two Largest Reservoirs in California Are Already at 'Critically Low Levels' and the Dry Season Is Just Starting*, CNN, May 7, 2022, <https://www.cnn.com/2022/05/07/us/california-water-shasta-oroville-climate/index.html> (last visited Dec. 15, 2022).

<sup>9</sup> See Dennis Shanahan, *Shrinking Wetlands Have an Impact on Migratory Birds in the Sacramento Valley, Biologists Say*, Fox40, Dec. 7, 2022, [https://fox40.com/news/fox40-focus/shrinking-wetlands-have-an-impact-on-migratory-birds-in-the-sacramento-valley-biologists-say/?utm\\_medium=email&utm\\_source=govdelivery](https://fox40.com/news/fox40-focus/shrinking-wetlands-have-an-impact-on-migratory-birds-in-the-sacramento-valley-biologists-say/?utm_medium=email&utm_source=govdelivery) (last visited Dec. 11, 2022).

<sup>10</sup> See Dennis Shanahan, *Shasta Lake Level Causing Far-Reaching Ripple Effects*, Fox40, Sept. 30, 2022, <https://fox40.com/news/fox40-focus/shasta-lake-level-causing-far-reaching-ripple-effects/?ipid=promo-link-block2> (last visited Dec. 11, 2022).



## **B. Water Supply (Chapter 6)**

The Draft EIR inappropriately concludes that changes to water supply are also, “by themselves, . . . not considered an impact under CEQA and thus are not evaluated as impacts” in the Draft EIR. (Draft EIR, pp. 6-1:5-6, 6-2:7-8.) Importantly, “[a]n EIR may not define a purpose for a project then remove from consideration those matters necessary to the assessment whether the purpose can be achieved.” (*County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9.) The stated purpose of the DCP is “to help achieve the State’s coequal goals of ‘providing a more reliable water supply for California.’ ” (Draft EIR, p. 2-2:7-8.) By omitting water supply from examination of potentially significant environmental effects of the Project, the Draft EIR “fails the legal duty and the mandate of [the appellate courts] to provide an informed and accurate analysis of the project and its impacts.” (*Ibid.*; see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428-436 [concluding that an EIR must include “a reasoned analysis” of the adequacy of water supplies to support the project]; *Cal. Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1240 [holding that an EIR that does not contain a proper analysis of water supplies “fails in its function as an informational document on the water issues”].) The Draft EIR must contain “a forthright discussion of a significant factor that could affect water supplies.” (*Cal. Oak Foundation, supra*, at p. 1237.) To satisfy the requirement of analyzing water supply issues, the Draft EIR must “contain facts and analysis, not just bare conclusions and opinions” to “enable those who did not participate in its preparation to understand and meaningfully consider the issues raised by the proposed project.” (*Ibid.*, internal quotes omitted.) The Draft EIR improperly omits a complete analysis of Project impacts on water supplies. (Draft EIR, p. 6-1:9-10.)

## **C. Groundwater (Chapter 8)**

The Draft EIR fails to adequately analyze or mitigate impacts to groundwater resources, including impacts to groundwater levels and related effects on municipal and domestic wells. More specifically, the Draft EIR’s analysis and mitigation is insufficient in regard to impacts on South American Subbasin (SASb), which the Sustainable Groundwater Management Act (SGMA) requires local agencies to manage. In this regard, the Draft EIR’s analysis fails to adequately assess potential conflicts with implementation of the SASb Groundwater Sustainability Plan (GSP).

### **1. Interconnected Surface Water and Groundwater Storage**

Proposed intake locations identified in the Draft EIR are located along the Sacramento River upstream of the Mokelumne Confluence in the southern portion of the SASb. According to the SASb GSP, this reach of the Sacramento River is identified as an interconnected surface water (ISW). Furthermore, the Cosumnes South American North American groundwater model, which was used in the development of the GSP for the North American, South American and Cosumnes subbasins, shows that this reach persistently loses water to groundwater in the SASb. The Project’s proposed diversion of surface water in this



reach will reduce river stage and change hydraulic gradients between surface water and groundwater. A lower hydraulic gradient between the river and the underlying aquifer with the Project implies that leakage to groundwater—from the currently losing Sacramento River—will decrease, thus reducing groundwater recharge along this reach.

To the contrary, however, the Draft EIR states that “[u]nder project alternatives, the region would see an *increase* in groundwater storage due to increased surface water supplies, as simulated in the surface water analysis. The increase in surface water supply reduces groundwater use and thus reduces the decline in groundwater storage.” (Draft EIR, p. 8-47:39-42.) Details (e.g., locations, volumes, and timing) of how this purported increased surface water supply was incorporated into the Delta groundwater model are not provided. These details are necessary to enable SCWA to better understand how the Project could result in an increased surface water supply, and how this additional supply of surface water affects the simulated results.

Moreover, because the change in modeled seepage has so much variability (showing both increases and decreases), a more localized and refined analysis (in space and time) is required to ensure that no acute, local impacts are missed. The Draft EIR analyzed seepage over a long stretch of the Sacramento River from the mouth of the Bear River to confluence with the San Joaquin River (Draft EIR, p. 8B-11:28), and accumulated seepage over an annual period, potentially masking significant changes to sections of the river where the ISW impacts to the SASb are more acute.

Draft EIR Tables 8B-3 and 8B-4 show reduced seepage, which seems reasonable with a lower water level in the Sacramento River due to exported streamflow. From the Sacramento County perspective, considering that the stream appears to currently be losing (i.e., recharging the aquifer), a reduction in seepage is of concern as this will reduce the supply of ISW that recharges the SASb groundwater system. The potential impacts to the SASb associated with reduced seepage is not discussed.

The Draft EIR should clearly demonstrate that the effects of changes in river flow and stage do not create undesirable results or exceed minimum thresholds for the ISW system, as identified in the SASb GSP. Specifically, the GSP identifies unreasonable impacts as:

- (i) percentage decrease in ISW reach length exceeds 5%, and
- (ii) percentage decrease in the 50th percentile of ISW streamflow exceedance during October-December spawning months exceeds 10% of historical conditions.

The Draft EIR defines a significant impact to ISW (Draft EIR § 8.3.2.2 and appen. 8B.4.1) as changes in stream losses or stream gains that exceed 5 percent with respect to the annual average baseline. The Draft EIR uses various aggregate statistics of numerical model output to summarize regional-scale impacts to surface water and groundwater nodes across the simulation’s spatial domain and temporal range. However, these aggregate

statistics do not address the localized spatial and temporal scale of significant and unreasonable impacts to ISW as defined in the SASb GSP (defining impacts by effects to individual reach lengths). Specifically, it is unclear which nodes or reach lengths are impacted and at what times during the year, thus results should be presented on an individual reach basis, ideally with lengths on the scale of 500 meters rather than tens of kilometers.

## **2. Groundwater Level Impacts—Municipal and Domestic Wells**

The Draft EIR addressed the Project impact on municipal (i.e., public supply) wells but did not directly address potential effects to the numerous private shallow domestic wells in the Project area (Figure 5A). Specifically, the Draft EIR does not identify the domestic wells by location or depth and does not present results for these wells. Rather, the Draft EIR combines domestic wells with other production wells and only evaluates impacts by depth range—and only uses average water level declines computed by the model. An analysis to identify the exact locations and depths of the shallow domestic wells and municipal wells in the Project area is necessary to accurately characterize the Project's impact on nearby drinking water wells. With minimal effort, SCWA's consultant, Larry Walker Associates (LWA) compiled a set of well locations within one mile of the tunnel alignments and drilled within the past forty years. LWA determined that there are twenty-three domestic wells and four public supply wells that meet these criteria. At a minimum, DWR should individually evaluate these wells so that potentially affected Delta residents and decision-makers are aware of the scope of potential Project impacts.

## **3. Groundwater Level Impacts—Model Fidelity**

DWR's groundwater model, Delta GW Model, uses a grid cell size that is coarser than the grid cell size of a model that DWR has recognized as insufficient to capture project impacts. (Draft EIR, pp. 8-14:15-17, 8A-6:7-8.) LWA concluded that the model computed heads are too coarse to be representative of actual conditions at the points of interest. To address this issue, LWA suggests that DWR evaluate the potential limitations of using the C2VSim-FG grid structure. A refined grid model, like the proposed C2VSim-D, should be used to conduct a new analysis to improve on computed impacts due to Project construction and operation.

The Draft EIR states every node of the model was compared between the baseline and each Project alternative, but then states the simulated groundwater elevations were averaged over the top three layers. (Draft EIR 8B4.2.1, p. 17:7-13). DWR should justify why its analysis averaged heads over the upper three layers (potentially masking larger declines in the shallow groundwater system) when the Delta GW Model was refined in the upper layers. This additional refinement should allow for better representation of shallow groundwater heads, and thus provide relevant information about impacts to both local wells and groundwater dependent ecosystems, but this is lost through averaging. Instead, the groundwater elevations should be presented for each of the first three layers individually.

#### **4. Groundwater Level Impacts—Thresholds of Significance**

The Draft EIR fails to substantiate the thresholds of significance for identified effects on groundwater. (Draft EIR, pp. 8-18 – 8-20.) For example, under Impact GW-2, the Draft EIR includes only the bare conclusion that changes in groundwater elevations are considered significant if there is a difference of greater than five feet in simulated groundwater elevations more than five percent of the time, compared to simulated groundwater elevations under existing conditions. (Draft EIR, p. 8-36.) The Draft EIR bases the threshold of significance for Impact GW-2 on fluctuations in historical groundwater elevations but contains no explanation nor supporting evidence that the selection of this threshold is appropriately conservative or reasonably predictive of a significant change in groundwater levels. (*Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 101-102 [stating an EIR must include “the analytic route” showing the agency’s connection between the evidence and conclusion].) Without providing the explanation of the selection of these thresholds, the Draft EIR effectively fails as an informational document. (Cal. Code. Regs., tit. 14, § 15121.) The statements of all other thresholds of significance, for Impact GW-1 and Impacts GW-3 through GW-7, are similarly deficient. To assess the true extent of Project impacts, a threshold of significance should be added specifically addressing impacts to shallow groundwater zones and GDEs.

#### **5. Groundwater Level Impacts—Failure to Quantitatively Assess Localized Impacts**

SCWA owns and operates municipal and industrial water wells in the town of Hood for the purpose of supplying the town with potable water. The Draft EIR states, “localized impacts [during project construction and maintenance] could affect water wells near the project sites.” (Draft EIR, p. 8-1:26-31.) Impact GW-2, for example, describes how Project construction under all Project alternatives may result in changes to groundwater levels in the immediate area of the constructed facilities, including the town of Hood. (*Id.*, p. 8-36.) However, the Draft EIR does not quantitatively assess the localized water level and quality impacts. (*Id.*, p. 8-1:26-31.)

#### **6. Groundwater Level Impacts—Mitigation**

As mitigation for localized impacts, DWR only points to post-impact mitigation measures as a solution rather than identifying water wells of concern and preventative measures. (See Draft EIR, p. 8-1:26-31.) The groundwater impact analysis does not consider—and thus does not mitigate—impacts specific to shallow groundwater zones and related impacts to groundwater-dependent ecosystems or Project-related impacts. The Draft EIR should provide the necessary analysis and should expand mitigation and monitoring efforts aimed at avoiding potential decrease in shallow groundwater elevations that could have impacts on regional recharge programs and projects.

Also, Mitigation Measure GW-1, Maintain Groundwater Supplies in Affected Areas, which proposes the installation of monitoring wells within 0.5 mile of Project sites at which dewatering could occur during construction or maintenance (Draft EIR, p. 8-34:2-8.), should—at a minimum—be expanded to include monitoring and mitigation of the shallow aquifer system with depths within the upper 30 feet of the ground surface that supports GDEs. Notably, however, Mitigation Measure GW-1 is insufficient as written to feasibly offer any reductions in Project impacts to groundwater. Its provisions are vague and unenforceable and lack the performance standards strictly required by CEQA when an agency defers formulation of specific mitigation details until after a project is approved. When mitigation specifics are deferred because it is infeasible to develop them during environmental review, CEQA demands that an agency adopt specific performance standards that the agency commits to achieving through the deferred mitigation, as well as identification of steps that can be reasonably expected to achieve the performance standards. (Cal. Code Regs., tit. 14, § 15126.4(a)(1)(B).) Mitigation Measure GW-1 meets none of these criteria. Its “weekly or monthly” monitoring at monitoring wells installed within 0.5 mile of Project sites at which dewatering could occur during construction or maintenance, provides no guidance on what monitoring frequency will be used at which locations, nor does it specify who will conduct the monitoring and reporting activities. Monthly monitoring is inadequate to properly characterize impacts to groundwater and to distinguish those impacts from non-Project factors. Support for the selection of a 0.5-mile radius, furthermore, is not provided. Performance standards are vague and confusing and steps to achieve them lack any detail required to evaluate their effectiveness. In the absence of information specifying what this mitigation measure is meant to achieve or who will implement it, the public is unable to assess whether it is effective, or indeed whether it will be carried out at all.

## **7. Groundwater Quality**

In the Draft EIR, water quality impacts are assessed using groundwater levels as a proxy to measure impacts. (Draft EIR 8B4.7.1, p. 29.) However, groundwater level is a poor surrogate for water quality as small changes in groundwater levels can change gradients influencing vertical and horizontal flow path directions over time and space. (LWA Report, p. 12.)

Moreover, in order to understand the extent of potential groundwater contamination caused by the Project, transport simulations on the Geotracker sites identified in Draft EIR Figures 8B.3-8.B.11 should be performed.

An in-depth quantitative analysis of all groundwater impacts, including local, acute impacts on groundwater wells and ISW, must be included in the Draft EIR. In order to adequately apprise the public and decision-makers of the potential impacts, the Draft EIR must be revised to include more specific analysis of local groundwater impacts, which requires a survey of domestic and municipal wells in the Project area and modeling of Project impacts on these wells, and employing appropriate methods. The revised Draft EIR also must address the Project’s potential to obstruct implementation of the SASb GSP. SCWA refers

DWR to the review of the Draft EIR prepared by LWA, attached hereto as Exhibit 5, regarding specific technical deficiencies DWR must address to ensure protection of groundwater supplies potentially impacted by the Project.

#### **D. Public Services and Utilities (Chapter 21)**

##### **1. Impacts to the Town of Hood’s Water Service**

As stated in the Draft EIR, “[c]onflicts with existing infrastructure could occur if project construction crosses an existing water line or other water conveyance infrastructure. A small portion of the Hood Well and Treatment facility lies above the proposed tunnel alignment for Alternatives 1, 2a, 2c, 3, 4a, 4c, and 5.” More specifically, the proposed Project’s Intakes B and C lie within eyesight of the town of Hood on two sides. A new pipeline would connect these intakes and run just outside of the town of Hood from the north, around the east, and to the south. (Draft EIR, p. 21-32.) The effects to water supply for the town of Hood of constructing these facilities and their permanent placement are not adequately analyzed in the Draft EIR.

Impact UT-2 (construction of new infrastructure causing significant impact on water service system) concludes that the impact to water supply would be less than significant. (Draft EIR, p. 21-32.) Regarding construction activities, the Draft EIR asserts that “the potential for water service providers . . . to be affected by a substantial increase in demand for water services . . . was analyzed” but there is no supporting information. (*Id.*, p. 21-22.) The analysis beginning at Draft EIR page 21-32 looks only at the proximity of the utilities to existing utilities, and does not analyze the groundwater supply impacts associated with an increase in demand for construction water or supply impacts associated with permanent barriers presented by the pipeline and Project infrastructure. And although the Draft EIR lists water providers potentially affected by the Project—including SCWA—it does not include any analysis of such impacts or mitigation of any such impacts to less than significant levels. (See *id.*, pp. 21-21, 21-32.) SCWA was never contacted for information on its water supply for the town of Hood and has no information on how the analysis regarding impacts to service providers was completed.

Any increase in water demand for construction or disruption of water supply facilities resulting from Project construction and operations and affecting the residents of the town of Hood, a small water supply system, must be analyzed and considered. DWR must consider potential disruptions to water service, including affecting the quality of the water supply and lowering of the water table as a result of drilling in close proximity to the town’s domestic water supply wells or other Project-related construction or operation activities.<sup>11</sup> Loss of water supply would be devastating to the residents of the town. There is no existing surface water treatment plant in Hood so groundwater is the only water source and would be very

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<sup>11</sup> See discussion of impacts to groundwater, herein.



expensive to replace.<sup>12</sup> As the water supplier in the Hood area, SCWA's current water system in that area cannot meet a substantial increase in demand if relied upon for construction activities or longer-term Project operation.<sup>13</sup> Since there is little customer growth assumed in the area, SCWA has not anticipated increased demand, and the water supply system capacity cannot handle a substantial increase in demand due to the introduction of the DCP.

## 2. Inadequate Analysis of Project Water Sources

The Draft EIR violates CEQA by failing to provide information that would allow those not involved in its preparation to evaluate the adequacy of its conclusions. "Decision makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, 40 Cal.4th at p. 431, quoting *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.) The Draft EIR does not specify the amount of water for construction and operations, and there is no discussion of the sufficiency of identified supplies, especially considering drought and other constraints on water supply availability, or the impacts associated with using any of the identified supplies.

Impact UT-2 states:

Construction activities may require various amounts of water depending on the activity and location. The water supply needed for construction will be satisfied through a combination of the following: import from local sources, exchanges, use of existing riparian diversions, new temporary appropriations, or existing SWP appropriations. Any use of diversions will be screened, as appropriate, and additional authorizations addressed following development of detailed engineering design.

(Draft EIR, p. 21-32.) The reference to "various amounts" of construction water provides no meaningful information about potential to assess Project demand or determine sufficiency of supplies. This vague statement of construction water supplies raises additional questions:

- What are the likely or available "local sources?"
- If an exchange is proposed, what water would be exchanged, and where would the water be diverted?
- What existing riparian diversions are available?

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<sup>12</sup> Note that the State of California has declared that every person has a right to clean, safe, and affordable drinking water. (See <https://water.ca.gov/Programs/All-Programs/Human-Right-to-Water>.) Any disruption or contamination of the water supply to the town of Hood could violate this law.

<sup>13</sup> As discussed herein, the Draft EIR does not clearly state the intended or expected sources of water for the Project.



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- What is the feasibility of obtaining “new temporary appropriations” given the already oversubscribed water conditions in the Delta, including Term 91 limitations on new appropriations?

These questions must be addressed in a revised Draft EIR to provide necessary information for the evaluation of supplying the Project with water.

DWR must also clarify conflicting information in the Draft EIR regarding potential sources of Project water for construction. In contrast to the statement of water supplies under Impact UT-2, the “CEQA Conclusion” of the Public Services and Utilities chapter defines construction water needs and sources as follows:

Water use during construction would come from *on-site water supplies*. During operations, on-site water supply would be used at the intakes and Southern Complex for the central and eastern alignments. At the Bethany Complex, water from the California Aqueduct would be used. No on-site water supplies are needed at the tunnel shafts. Diversions of surface water and groundwater would be limited to historical diversions, and other methods such as capturing and treating water, and reusing stormwater runoff, would reduce construction water usage to the extent feasible. It is anticipated that construction of all alternatives would have water supply met by nonmunicipal sources without any new water supply entitlements.

(Draft EIR, p. 21-41, emphasis added.) None of the sources listed in the description of Impact UT-2 is an “on-site” supply, at least within Sacramento County.

There is also no discussion in the Draft EIR of the feasibility of any proposed water source needed to support the Project construction—which would occur over a ten-year period. “The water sources . . . and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis,” and thus, the EIR “must analyze . . . the impacts of providing water to the entire project.” (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, 40 Cal.4th at p. 431.)

Moreover, no information about the amount of water needed for Project operations water use is provided. Rather than describe the amount of water needed for Project operations, the Draft EIR merely refers the reader to engineering reports, without even so much as a page reference:

Water needed for project operations is described in the Volume 1: Delta Conveyance Final Draft Engineering Project Report—Central and Eastern Options (Delta Conveyance Design and Construction Authority 2022i) and the Volume 1: Delta Conveyance Draft Engineering Project Report—Bethany Reservoir Alternative (Delta Conveyance Design and Construction Authority 2022j).

(Draft EIR, p. 21-39.) The Draft EIR must be revised to include an adequate analysis of the water supply needed for the Project, including impacts associated with providing that supply. The information must be provided in the relevant chapters of the EIR: “The seriousness of water supply issues . . . merits discussion in the text of the EIR, where it is most readily accessible.” (*Cal. Oak Foundation, supra*, 133 Cal.App.4th at p. 1239.) Readers cannot be expected to “ferret out” information to make such an evaluation. The California Supreme Court has held that “information ‘scattered here and there in EIR appendices’ or a report ‘buried in an appendix,’ is not a substitute for ‘a good faith reasoned analysis.’ ” (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, 40 Cal.4th at p. 442.) Without any information as to the required amount of water or available sources, it is not possible to conclude there will be an adequate water supply for the Project, or that use of these other sources for Project construction would not result in significant impacts from the construction of new facilities, or result in significant impacts to groundwater (including creating a cone of depression, or impacts to groundwater dependent ecosystems) or reduction in applied water in other locations.

Much of the last decade has been a period of extended drought, with curtailments of existing diversions in the Delta and severe cutbacks in SWP supplies. DWR this year already has notified SWP contractors of a potential fourth year of drought, and that municipal water supplies may be as low as 5 percent of contract amounts, with potential supplies limited to that necessary to satisfy public health and safety demands.<sup>14</sup> In August, Governor Newsom announced that, “[h]otter and drier weather conditions spurred by climate change could reduce California’s water supply by up to 10% by the year 2040.”<sup>15</sup> Given the ongoing water shortages, what evidence supports the Draft EIR’s implicit conclusion that adequate water supplies will be available to meet Project construction and operation needs, or that such supplies could be available to the Project without substantial adverse effects on other water users or the environment?

## V. Conclusion

There is hardly an issue of more significant public concern in California than water supply availability. Indeed, water supply reliability for Delta exporters is the stated purpose of the DCP. Whether the Project is capable of achieving that purpose is not clear. It is definitely not clear to SCWA that the Project could achieve its purposes without significant adverse impacts to SCWA facilities and operations, to domestic and municipal surface and groundwater resources, including water supplies and the environment in and above the Delta.

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<sup>14</sup> See <https://mavensnotebook.com/2022/12/01/this-just-in-dwr-announces-initial-state-water-project-allocation-outlines-actions-for-a-possible-fourth-dry-year/>.

<sup>15</sup> See “Governor Newsome Announces Water Strategy for a Hotter, Drier California,” Aug. 11, 2022, available at <https://www.gov.ca.gov/2022/08/11/governor-newsom-announces-water-strategy-for-a-hotter-drier-california/>.

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SCWA encourages DWR to modify the Project to meaningfully address impacts to the FRWP and Hood wells, and the SASb, including moving the proposed intakes outside of an area that may adversely influence FRWP operations or the Hood wells. DWR should coordinate and consult with SCWA as it revises the Project and Draft EIR to ensure that all impacts, including those identified in these comments, are accurately and adequately evaluated and fully avoided or mitigated. These changes necessarily will constitute significant new information and are of critical interest and concern to SCWA and residents of the affected communities, and thus a revised Draft EIR addressing these issues must be recirculated for public review and comment. Please contact me at [petersonmi@saccounty.gov](mailto:petersonmi@saccounty.gov) to discuss these comments.

Respectfully submitted,



MICHAEL L. PETERSON  
Director of Department of Water Resources,  
Acting as Agency Engineer  
Sacramento County Water Agency

Encs.

MEC:cr



# Exhibit 4

# Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan

## 1.0 Introduction

Preconstruction field investigations (hereafter referred to as geotechnical investigations, preconstruction field investigations, or field investigations) are scheduled to begin in April 2024 (site clearance activities) and May 2024 (geotechnical investigations). Data collected from preconstruction field investigations is used to inform planning and design studies prior to implementing and constructing the Delta Conveyance Project (DCP). As these preconstruction field investigations were described and evaluated as part of the DCP Final Environmental Impact Report (FEIR) (December 2023 – SCH # 2020010227), compliance with the DCP Mitigation Monitoring and Reporting Program (MMRP) is required (FEIR Section 3.15). This document constitutes the activity-specific environmental compliance monitoring plan (Plan) required by DCP FEIR Environmental Commitment (EC) – 14 (*Construction Best Management Practices for Biological Resources*) for the 2024 preconstruction field investigations. As project planning proceeds, DWR will prepare separate activity-specific environmental compliance monitoring plans for other project activities. As discussed further below, this Plan includes the document objectives, the primary objectives of 2024 preconstruction field investigations, the study area, and monitoring commitments proposed to satisfy the needs of EC-14.

## 2.0 Document Objectives

Prior to commencing preconstruction field investigations, EC-14 requires DWR to develop an activity specific environmental compliance monitoring plan to monitor, enforce and document measures to protect special-status fish, wildlife, plant species, and their habitats, designated critical habitat, and sensitive natural communities. This document provides the information that will be collected prior to, during, and then following preconstruction field investigations. Follow-up documentation will be required in the form of preconstruction site clearance survey documentation, daily monitoring logs, and quarterly monitoring reports. As per EC-14, this activity specific plan includes information and documentation collection protocols to satisfy the following elements (Refer to Section 6.0 – *Compliance with EC-14 Elements*).

- Reference to or inclusion of the Stormwater Pollution Prevention Plan (SWPPP) prepared under the [Construction General Permit \(CGP\)](#) (Order WQ 2022-0057-DWQ; NPDES NO. CAS000002), where one is needed. (See EC-4b, Develop and Implement Stormwater Pollution and Prevention Plans.)

- Summaries or copies of planning and preconstruction surveys (if applicable) for natural communities and special-status species.
- Description of mitigation measures to be implemented, including a description of site or activity specific Best Management Practices (BMPs) or additional measures not otherwise included in the project.
- Descriptions of monitoring parameters (e.g., turbidity), including the specific activities to be monitored (e.g., dredging, grading activities) and monitoring frequency and duration as well as parameters and reporting criteria (e.g., turbidity is not to exceed 10 nephelometric turbidity units (NTUs) above background. Exceedances will be reported, and the contractor must identify and correct the cause.).
- Description of roles and responsibilities of the monitors and protocols for notifying CDFW, NMFS, and USFWS, if needed.
- A daily monitoring log prepared by the monitor, which documents the day's activities, notes any problems identified and solutions implemented to rectify those problems, and document notifications of the superintendent and/or the fish and wildlife agencies regarding any exceedances of specific parameters (i.e., turbidity) or observations of special-status species. The monitoring log will also document activity start/end times, weather and general site conditions, and any other relevant information.

### 3.0 Preconstruction Field Investigations – Purpose and Background

FEIR Chapter 3 – *Description of the Proposed Project and Alternatives* describes the project evaluated in the FEIR. Section 3.15 – Field Investigations explains that ‘work related to geotechnical, hydrogeologic, agronomic testing, and construction test projects (geotechnical investigations) would occur during the preconstruction and construction periods following the adoption of the EIR, identification of an approved project footprint, and acquisition of all required permits.’ The preconstruction field investigations will ‘more specifically identify appropriate construction methods addressed in the final design documents. These investigations would also address the establishment of geological and groundwater monitoring programs that could extend during the design and construction phases of the [Approved] project’ (TM 14B – Potential Future Field Investigations – Bethany Reservoir Alternative, 2022b).

To support the project description and environmental analysis in the FEIR, the Delta Conveyance Design and Construction Authority (DCA) working under the direction of DWR developed Engineering Project Reports (EPRs) and associated technical memoranda (TMs) (DCA 2022a, 2022b) to detail project engineering considerations. The Bethany Reservoir Alternative (Approved Project) EPR contains a detailed description of the Approved Project and the TMs that informed its design. Among other information, TM 14B – Potential Future



Field Investigations – Bethany Reservoir Alternative details the geotechnical explorations (or field investigations) that constitute preconstruction field investigations necessary to support continued development of the project design documents. TM 14B Attachments A-C provide additional information related to field investigations used in the FEIR analysis of impacts for the Project (Option B2B or B2).

#### 4.0 Preconstruction Field Investigations – FEIR Description

The FEIR provides precise zones where field investigations would occur, and an approximated acreage and maximum number of each type of exploration was used for the FEIR impact analysis. This information was utilized to identify and disclose potential direct and indirect environmental effects that may result from the field investigations as analyzed in the FEIR. TM 14B, Attachment A (Option B2) provides total estimates for preconstruction field investigations.

FEIR Mapbook 3-3 for the Bethany Alternative (Approved Project) depicts the zones in which geotechnical investigations would occur (i.e., geotechnical investigation zone). Each map further indicates that geotechnical investigations would be conducted within all project feature construction boundaries.

#### 5.0 Preconstruction Field Investigations – General Terms

As proposed, the 2024 preconstruction field investigations will *not* include overwater activities, activities that involve trenching, activities within the West Tracy Fault or Bethany Fault, pile driving, vibratory testing of dynamic properties, geodetic mapping, potholing, monument installation, test fills for settlement studies, 800 ft. inclined boreholes, or ground improvement test zones. Consistent with the protocols used for the geotechnical activities completed between 2020 - 2023<sup>1</sup>, the 2024 preconstruction field investigations will adhere to the following general terms:

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<sup>1</sup> DWR approved, and completed, the prior geotechnical activities between 2020 - 2023 in reliance on the July 2020 Soil Investigations for Data Collection in the Delta Final Initial Study and Mitigated Negative Declaration (Soil Investigations IS/MND) and associated addenda adopted in February 2021 and June 2022 (SCH# 2019119073).

**Table 1: General Terms for 2024 Preconstruction Field Investigations**

<b>General Terms for 2024 Preconstruction Field Investigations<sup>2</sup>:</b>
Geologic activities shall occur for no more than 10.5 hours each day between 7:00 am to 7:00 pm Monday through Friday only
No entries or inspections shall occur between Wednesday and Sunday of Thanksgiving week and between December 23 and January 1, or on the 4th of July, Labor Day, or the Memorial Day holidays
On vineyards and other planted land, there shall be no entries or inspections between September 1 and October 15 unless authorized by the landowner in writing
Between October 1 and February 25 there shall be no entries or inspections on hunting lands
DWR, its Contractors, and/or Representatives, will adhere to all access restrictions related to pesticides in use on the parcels where field investigations are proposed
DWR may access a parcel for up to 2 days to undertake preliminary identification activities to designate the exact locations of the boring, and CPT sites
Entry for CPT shall be for no more than 2 days per CPT site
Entry for borings shall be permitted for up to 11 days per soil boring
Tribal representatives (2) and DWR (up to 4) have two (2) additional full days and two (2) half days to do pre-drilling site clearances prior to the commencement of drilling activities
DWR shall give 14 days' verbal notice of intended date to drill or CPT test by telephone and email to the owner's designated representative or, if none, to the owner; the notice will include a description of the activities that will be conducted on the property and a general description of the area where activities will take place
DWR shall give 10 days' written notice to confirm the information provided in the 14-day verbal notification and to provide the owner's designated representative or, if none, the owner with information pertaining to the purpose of the several types of studies to be conducted on the property and the point of contact(s) for DWR
DWR shall give 72-hour notice by telephone and email to the owner's designated representative or, if none, to the owner for entries
DWR should make all reasonable efforts to accommodate reasonable requests to alter the dates based on the owner's necessary use of the property
Maximum soil boring depth is limited to 300 feet <sup>3</sup>
DWR shall not enter closed structures on the property, including, specifically, office buildings, garages, fully enclosed sheds, and buildings not considered open to the public
DWR shall comply with any general rules or regulations of a reclamation district applicable to the underlying property owner regarding use or weight of vehicles on its easement area, or restricted access to pumping stations, digging near levees, and the like

<sup>2</sup> DWR developed the terms in Table 1 in consideration of conditions included in prior court ordered entries for geotechnical activities, including the November 21, 2023, Order Permitting Entry and Investigation of Real Property for Environmental, Cultural, Geological and Drilling Investigations entered by the San Joaquin County Superior Court in Judicial Council Coordination Proceedings (JCCP) Case No. 4594, as well as the terms of the proposed Temporary Entry Permits (TEPs) provided to landowners by DWR for the 2024 preconstruction field investigations.

<sup>3</sup> Prior Court Ordered Entries have authorized, and DWR has completed, soil borings up to a depth of 300 feet. The 2024 preconstruction field investigations propose a maximum depth of 250 feet.

<b>General Terms for 2024 Preconstruction Field Investigations<sup>2</sup>:</b>
DWR shall coordinate with Fish and Game regarding entry to all areas covered by a conservation easement or grant
DWR personnel and its contractors shall have identity cards and be prepared to show them to any owner who requests to see such
DWR personnel shall use their best efforts not to needlessly block or impede any activity by the owner or his or her agents on the property
DWR shall contact railways prior to entry and shall comply with reasonable conditions of special visible clothing near the railroad tracks and shall cross the railroad tracks with vehicles only at designated public crossings or in consultation with railroad personnel
DWR personnel should not linger or loiter or perform work within 25 feet of the railway tracks
DWR shall use designated crossing points for pedestrian crossing where reasonably available and shall cross only when no trains are observable
DWR shall not fence any area of property or to prevent access of the owners to their properties, except when DWR personnel are actually utilizing that specific area of the property
DWR vehicles or equipment shall not unreasonably block access by other vehicles on levee roads or other reclamation district-operated roadways
DWR shall not perform any borings or CPT holes within three hundred (300) feet of a landside levee toe, without first giving ten (10) days' notice of the change of site plan and proposed work to both the affected reclamation district and the landowner
DWR shall follow the guidelines in its Bulletin 74-90 with respect to the method by which the exploratory borings will be sealed
DWR shall restore the property, as near as possible, to its original condition after the activities are completed
Upon request by an owner, DWR shall promptly provide a copy of the Delta Conveyance Design and Construction Authority's "Delta Conveyance Project Steps in Soil Drilling and CPT Sounding" Field Work Manual that DWR is using for the geologic and drilling activities
Following compilation of the data gathered and within one hundred fifty (150) days of a written request by the landowner, DWR will provide the landowner with all data, including, but not limited to notes, surveys, reports, and photographs, obtained from any investigation on the landowner's property

## 6.0 Compliance with EC-14 Elements

6.1 Reference to or inclusion of the SWPPP prepared under the CGP, where one is needed. (See EC-4b, Develop and Implement Stormwater Pollution and Prevention Plans.)

- Federal statutes and regulations require discharges to waters of the United States comprised of stormwater associated with construction activity to obtain NPDES permit coverage (except operations that result in disturbance of less than one acre of total land area and that are not part of a larger common plan of development or sale). (Order WQ 2022-0057-DWQ NPDES NO. CAS000002). A SWPPP is not required for the 2024 preconstruction field investigations because all 2024 preconstruction field investigations will disturb less than one acre of total land area.

## 6.2 Summaries or copies of planning and preconstruction surveys (if applicable) for natural communities and special-status species

- FEIR Chapter 13: Terrestrial Biological Resources includes a set of mapbooks specific to the approved project providing the distribution of natural communities (within the project area) and species-specific habitat models, used for the impact analyses. Summaries and/or copies of planning and preconstruction surveys, in compliance with the DCP Mitigation Monitoring and Reporting Program (MMRP), and measures in this document, will be developed once authorization is received to enter private properties. Preparation for preconstruction field investigation site clearance surveys typically involve a desktop review of aerial imagery which would include a California Natural Diversity Database (CNDDDB) search, along with in-field surveys and verifications by qualified biologists and resource specialists. Information from on the ground surveys will be used to adjust preconstruction filed investigation locations so as to avoid impacts to special status species, their habitats, as well as cultural and Tribal resources ascertained from California Historical Resources Information System (CHRIS) cultural resources records searches as well as field surveys. Daily monitoring reports and clearance survey information will be compiled into quarterly monitoring reports. Examples of daily logs and quarterly reports are attached to this report (See Attachments 1 and 2).
- Planning and preconstruction survey checklists will include elements from this document.

## 6.3 Description of mitigation measures to be implemented, including a description of site or activity specific BMPs or additional measures not otherwise included in the project.

- The 2024 preconstruction field investigations will comply with a) the general terms for preconstruction field investigations (See Table 1), b) the DCP MMRP measures (See Table 2), and c) an additional list of activity-specific measures informed by the protocols utilized by DWR in completing geotechnical activities from 2020-2023 (See Table 3).

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**Table 2: DCP MMRP Measures**

**DCP MMRP Measures<sup>4 5</sup>**

Title	Description/Purpose
EC-1	Conduct Environmental Resources Worker Awareness Training
EC-2	Develop and Implement Hazardous Materials Management Plans
EC-3	Develop and implement spill prevention, containment, and countermeasure plans
EC-4a	Develop and implement Erosion and sediment control plans
EC-4b	Develop and Implement Stormwater Pollution Prevention Plans
EC-5	Develop and Implement a Fire Prevention and Control Plan
EC-6	Conduct Cultural Resources Awareness Training
EC-7	Off-Road Heavy-Duty Engines
EC-8	On-Road Haul Trucks
EC-9	On-Site Locomotives
EC-10	Marine Vessels
EC-11	Fugitive Dust Control
EC-12	On-Site Concrete Batching Plants
EC-13	DWR Best Management Practices to Reduce GHG Emissions
EC-14	Construction best Management practices for biological resources (Appendix 3B)
EC-15	Sediment Monitoring, Modeling, and Reintroduction Adaptive Management
EC-16	Provide Notification of Construction and Maintenance Activities in Waterways
EC-17	Pursue Solar Electric Power Options at Conveyance Facility Sites
EC-18	Minimize Construction-Related Disturbances to Delta Community Events and Festivals
AES-1a	Install Visual Barriers between Construction Work Areas and Sensitive Receptors
AES-1b	Apply Aesthetic Design Treatments to Project Structures
AES-1c	Implement Best Management Practices in Project Landscaping Plan

<sup>4</sup> For the complete descriptions of the MMRP measures, please go to: <https://cadwr.app.box.com/s/qct5ey81zeyaxouccc25yyrotzfh2wq8>

<sup>5</sup> Part of documenting compliance with mitigation measures in the MMRP includes confirming whether specific measures are applicable to an activity. Based on the scope of the proposed 2024 preconstruction field investigations, some of the mitigation measures in the MMRP are not applicable. For example, the 2024 preconstruction field investigations do not include overwater activities therefore mitigation measures specific to over water activities do not apply.



**DCP MMRP Measures<sup>4 5</sup>**

Title	Description/Purpose
AES-4a	Limit construction outside of daylight hours within 0.25 miles of residents at the intakes
AES-4b	Minimize fugitive light from portable sources used for construction
AES-4c	Install visual barriers along access routes, where necessary, to prevent light spill from truck headlights toward residences
AG-1	Preserve Agricultural Land
AG-3	Replacement or relocation of affected infrastructure supporting agricultural properties
AQ-1	Offset construction-generated criteria pollutants in the Sacramento Valley Air Basin
AQ-2	Offset construction-generated criteria pollutants in the San Joaquin Valley Air Basin
AQ-3	Offset construction-generated criteria pollutants in the San Francisco Bay Area Air Basin
AQ-5	Avoid Public Exposure to localized particulate matter and nitrogen dioxide concentrations
AQ-9	Develop and implement a Greenhouse Gas (GHG) Reduction Plan to Reduce GHG Emissions from Construction and Net CVP Operational Pumping to Net Zero
AQUA-1a	Develop and Implement an Underwater Sound Control and Abatement Plan
AQUA-1b	Develop and Implement a Barge Operations Plan
AQUA-1c	Develop and Implement a Fish Rescue and Salvage Plan
BIO-2a	Avoid or minimize impacts on special-status natural communities and special-status plants
BIO-2b	Avoid or minimize impacts on terrestrial biological resources from maintenance activities
BIO-2c	Electrical Power Line Support Placement
BIO-14	Avoid and Minimize Impacts on Vernal Pool Aquatic Invertebrates and Critical Habitat for Vernal Pool Fairy Shrimp
BIO-18	Avoid and Minimize impacts on Valley Elderberry Longhorn Beetle (VELB)
BIO-21	Avoid and minimize impacts on bumble bees
BIO-22a	Avoid and minimize impacts on California Tiger Salamander (CTS)
BIO-22b	Avoid and minimize operational traffic impacts on wildlife
BIO-23	Avoid and minimize impacts on Western Spadefoot Toad
BIO-24a	Avoid and minimize impacts on California Red-legged frog (CRLF) and critical habitat
BIO-24b	Compensate for impacts on California Red-Legged Frog Habitat Connectivity
BIO-25	Avoid and minimize impacts on Western Pond Turtle (WPT)
BIO-26	Avoid and minimize impacts on special-status reptiles

**DCP MMRP Measures<sup>4 5</sup>**

<b>Title</b>	<b>Description/Purpose</b>
BIO-30	Avoid and minimize impacts on Giant Garter Snake (GGS)
BIO-31	Avoid and minimize impacts on Western Yellow-Billed Cuckoo
BIO-32	Conduct preconstruction surveys and implement protective measures to avoid disturbance of California Black Rail
BIO-33	Avoid and minimize disturbance of Sandhill Cranes
BIO-34	Avoid California Least Tern Nesting Colonies and minimize indirect effects on colonies
BIO-35	Avoid and minimize impacts on Cormorant, Heron, and Egret Rookeries
BIO-36a	Conduct nesting surveys for special-status and non-special status birds and raptors and implement protective measures to avoid disturbance of nesting birds and raptors
BIO-36b	Conduct preconstruction surveys and implement protective measures to avoid disturbance of White-Tailed Kite
BIO-37	Conduct surveys for Golden Eagle and Avoid Disturbance of Occupied Nests
BIO-39	Conduct preconstruction surveys and implement protective measures to minimize disturbance of Swainson’s Hawk
BIO-40	Conduct surveys and minimize impacts on Burrowing Owl
BIO-42	Conduct surveys and minimize impacts on Least Bell’s Vireo
BIO-44	Conduct preconstruction surveys and implement protective measures to avoid disturbance of tricolored blackbird
BIO-45a	Compensate for the Loss of Bat Roosting Habitat on Bridges and Overpasses
BIO-45b	Avoid and Minimize impacts on roosting bats
BIO-46	Conduct Preconstruction survey for San Joaquin Kit Fox (SJKF) and implement avoidance and minimization measures
BIO-47	Conduct preconstruction survey for American Badger and implement avoidance minimization measures
BIO-53	Avoid and minimize impacts on terrestrial wildlife connectivity and movement
CMP	Compensatory Mitigation Plan
CUL-1a	Avoid Impacts on Built-Environment Historical Resources through Project Design
CUL-1b	Prepare and implement a built-environment treatment plan in consultation with interested parties
CUL-2	Conduct a survey of inaccessible properties to assess eligibility, determine if these properties will be adversely affected by the project, and develop treatment to resolve or mitigate adverse impacts
CUL-3a	Prepare and implement an archaeological resources management plan
CUL-3b	Conduct cultural resources sensitivity training
CUL-3c	Implement archaeological protocols for field investigations
CUL-5	Follow State and Federal Law Governing Human Remains If Such Resources Are Discovered during Construction
GW-1	Maintain groundwater supplies in affected areas
GW-5	Reduce Potential Increases in Groundwater Elevations near Project Intake Facilities

**DCP MMRP Measures<sup>4 5</sup>**

Title	Description/Purpose
HAZ-2	Perform a phase I Environmental Site Assessment prior to construction activities and remediate
NOI-1	Develop and implement a noise control plan
PALEO-1a	Prepare and implement a monitoring and mitigation plan for paleontological resources
PALEO-1b	Educate construction personnel in recognizing fossil material
PH-1a	Avoid creating areas of standing water during preconstruction field investigations and project construction
PH-1b	Develop and implement a mosquito management plan for compensatory mitigation sites on Bouldin Island and at I-5 ponds
SOILS-5	Conduct site-specific soil analysis and construct alternative wastewater disposal system as required
TCR-1a	Avoidance of impacts on Tribal Cultural Resources
TCR-1b	Plans for the management of Tribal Cultural Resources
TCR-1c	Implement measures to restore and enhance the physical, spiritual, and ceremonial qualities of affected Tribal Cultural Resources
TCR-1d	Incorporate Tribal knowledge into compensatory mitigation planning (restoration)
TCR-2	Perform an assessment of significance, known attributes, and integrity for individual CRHR eligibility
TRANS-1	Implement site-specific construction transportation demand management plan and transportation management plan
WQ-4	Contra Costa Water District Interconnection Facility
WQ-6	Develop and implement a mercury management and monitoring plan

**Table 3: Additional Compliance Parameters for 2024 Preconstruction Field Investigations Based on Past Soil Investigations**

<b>Additional Compliance Parameters for 2024 Preconstruction Field Investigations Based on Past Soil Investigations - Description<sup>6</sup></b>
Each Impact Area will be returned to as close to pre-activity conditions as possible. This will be documented by still photos taken pre- and post-activity
No building structures will be removed or disturbed. Preconstruction field investigations will occur at a distance greater than 100 feet (30.5 meters) from residences and small business operations. If fencing needs to be removed for access, it will be replaced after the work is completed.
No trees or vines will be removed during exploration activities; and only minor disturbances to vegetation would occur during mobilization of equipment. This minor disturbance may consist of mowing, removal of a few tree limbs, or trimming of bushes for site access. However, if access requires removal of any vegetation, the landowner would be consulted first to minimize the impact to both vegetation and the landowner.
Any proposed soil investigation activities that occur on agricultural lands will be grouted in accordance with materials that conform to ANSI and ASTM standards from the full depth to five feet (1.5 meters) below the surface. The final five feet (1.5 m) of topsoil will be replaced to return the Impact Area to as close to pre-activity conditions as possible. The backfill procedure will be in accordance with State of California Bulletin 74-81/74-90 and local county standards.
Water all exposed surfaces two times daily. Exposed surfaces include, but are not limited to soil piles, graded areas, unpaved parking areas, staging areas, and access roads.
A qualified team of biologists will conduct a habitat assessment and reconnaissance level surveys approximately two weeks prior to the onset of ground disturbing soil investigation activities for any special status plants and wildlife that have the potential to occur within the project area (see Appendix A -Wildlife and Plant Species List). If, based on the habitat assessment and reconnaissance level surveys, the biologists identify the potential for special status wildlife impacts, the location will be shifted to a suitable location as identified by the qualified team of biologists, which is defined as a location that achieves the following four performance standards: (1) satisfies the requirements of Mitigation Measures BIO -2 through BIO -20, AES -1, AES -2, HYD -1, and HAZ -1 through HAZ - 4 (2) is the minimum distance necessary (informed by the mitigation measures cited in (1)) to ensure that no special status plants and wildlife with the potential to occur is disturbed during the work activities, (3) does not increase impacts to other resources to above a level of significance, and (4) the qualified biologist team must determine that commencing activities does not have the possibility to cause unpermitted take under federal or State law. If a suitable location, as defined above, cannot be determined within adjacent areas by the qualified team of biologists, then the soil investigation at that location will not be conducted.

<sup>6</sup> DWR developed the additional measures included in Table 3 in consideration of the mitigation measures included in the Mitigation Monitoring and Reporting Program for the Soil Investigations IS/MND, as modified January 2023.

<b><i>Additional Compliance Parameters for 2024 Preconstruction Field Investigations Based on Past Soil Investigations - Description<sup>6</sup></i></b>
The qualified biologist(s) must, at a minimum, have experience conducting surveys to identify the specific species and associated habitat that could occur on site.
All federally or state-listed species observed will be allowed to leave the Impact Area on their own. If the biologist determines that continuing activities could potentially cause unpermitted take under federal or State law to a federally or state-listed species, activities must cease. Work may not resume until the on-site biologist has determined there is no longer the possibility of causing unpermitted take under federal and State law.
No project activities will be conducted during or within 24 hours following a rain event in locations that have a potential for special status amphibians to occur or are near wetlands or other water features.
Any active rodent burrows or suitable cracks identified by a qualified biologist during the pre-construction survey will be flagged so that they can be avoided.
Any burrows, cracks, or fissures suitable for rodents that cannot be avoided and will be temporarily impacted by the movement and placement of equipment or other project activities will be covered with plywood to avoid burrow collapse.
Leaf litter will be surveyed by the biologist for presence of wildlife prior to the onset of work, and if any special-status species are identified as using the leaf litter for refuge it will be avoided and a buffer will be established by a qualified biologist and flagged.
Piles of rock, riprap, or other materials that could provide refuge to reptiles or amphibians will be avoided. If movement of such materials cannot be avoided, a qualified biologist will survey the area prior to disturbance and monitor the material movement and restoration of the area following completion of Proposed Project activities.
Sanitation facilities (e.g., portable toilets) shall be sited in a manner that avoids any direct connection to the storm drainage system or receiving water.
Sanitation facilities shall be regularly cleaned and/or replaced and inspected daily for leaks and spills.
Stockpiling materials, portable equipment, vehicles, and supplies, including chemicals, will be restricted to areas adjacent to the drill or CPT rig, and not adjacent or within riparian and wetlands areas or other sensitive habitats.
Appropriate traffic controls will be implemented, based on the conditions at each soil investigation site, according to standards set by Caltrans and counties. Flaggers may be used during ingress and egress of boring equipment and work crews to allow flow of traffic while maintaining safety measures for the crew, especially if these activities occur in areas of heavy traffic or reduced visibility. Lane closures will be implemented when soil investigation sites are within or immediately adjacent to public roadways and will employ safety measures such as advance warning areas and flaggers, as prescribed by Caltrans and county regulations. Public notifications will be made in coordination with Caltrans, counties, CHP, and other entities. Traffic controls and lane closures will consider access for emergency services and be coordinated through the encroachment permit processes implemented by Caltrans and counties, with CHP coordination as required.
No public roads, waterways or land access will be fully closed.

***Additional Compliance Parameters for 2024 Preconstruction Field Investigations Based on Past Soil Investigations - Description<sup>6</sup>***

A field reconnaissance, marking or staking the exploration site, and calling Underground Service Alert (USA) for utility clearance will be conducted by qualified personnel for each planned soil exploration location. Based upon the information gathered, sites will be adjusted to ensure no utilities are impacted.

DWR shall not trap any wildlife in a conservation easement without specific approval or permit of USFWS, NMFS, or CDFW as appropriate.



6.3 Descriptions of monitoring parameters (e.g., turbidity), including the specific activities to be monitored (e.g., dredging, grading activities) and monitoring frequency and duration as well as parameters and reporting criteria (e.g., turbidity is not to exceed 10 NTUs above background. Exceedances will be reported, and the contractor must identify and correct the cause.).

- Daily monitoring activities by the biologist shall include, but will not be limited to the following:
  - Conducting pre-construction nesting bird and Swainson's Hawk surveys 72 hours prior to the start of preconstruction field investigations, if they are planned to occur during the nesting season.
  - Monitoring project field activities
  - Assisting with siting equipment to avoid any sensitive resources located nearby and clearly marking or delineating any exclusion areas and monitoring for compliance with these avoidance measures.
  - Walking the site before crews enter each day and examining the area below any vehicle or piece of equipment that has been stationary for 24 hours or greater to ensure that no wildlife species are present.
  - Conducting environmental awareness training and/or cultural sensitivity training session for all new field personnel prior to the start of each workday. Maintaining a list of trained staff and provide to DCA Field Activity Coordinator (or equivalent).
  - Confirming the location of and emphasizing to the crew any flagged avoidance areas.
  - Documenting the field crew's activities and their compliance with the program's commitments in Daily Monitoring Logs which include photos when available. (This may include: adhering to speed limits, trash containment, ensuring that there are not firearms and no pets, installation of escape ramps where necessary, and capping pipes/removal of debris piles.)
  - Monitoring for any federally or state-listed species or California Species of Special Concern per requirements listed in DCP MMRP and any environmental permits (where applicable). If any federally or state-listed species or nesting birds are observed, monitors will determine if activities are disturbing the species and if activities must cease or if the species are undisturbed and/or could leave on its own.
  - Alerting Lead Biological Monitor to any observations of federally or state-listed species or California Species of Special Concern immediately and recording in Daily Monitoring Log. (Follow protocols for wildlife agency notifications, as above.)

- Limiting work to periods of no precipitation.
- Completing Daily Monitoring Logs and providing to Project Biologist who will provide to DWR Environmental Manager. Ensure that Daily Monitoring logs include documentation of field activities, observations, and hours on site.

6.4 Description of roles and responsibilities of the monitors and protocols for notifying CDFW, NMFS, and USFWS, if needed.

- Section 2.1 (page 2-4) of the DCP MMRP describes the primary parties responsible for implementation, monitoring and reporting as it relates to the MMRP.
- Protocols for notifying wildlife agencies:
  - Per EC-14, any sightings of special status species will be reported to CDFW and USFWS via email within 1 working day of the discovery. A follow-up report will be sent to these agencies, including dates, locations, habitat description, and any corrective measures taken to protect special status species.
  - The qualified biologist(s) will maintain monitoring records that include (1) the beginning and ending time of each day's monitoring effort; (2) a statement identifying the species encountered, including the time and location of the observation; (3) the time the specimen was identified and by whom and its condition; (4) the capture and release locations of each individual (where permitted); (5) photographs and measurements of each individual; and (6) a description of any actions taken. The biologist(s) will maintain complete records in their possession while conducting monitoring activities and will immediately provide records to USFWS and CDFW upon request. If requested, all monitoring records will be provided to agencies according to the reporting requirements of the relevant permits.

6.5 A daily monitoring log will be prepared by the monitor, which documents the day's construction activities, notes any problems identified and solutions implemented to rectify those problems, and document notifications of the construction superintendent and/or the fish and wildlife agencies regarding any exceedances of specific parameters (i.e., turbidity) or observations of special-status species. The monitoring log will also document construction start/end times, weather and general site conditions, and any other relevant information.

- Daily biological monitoring reports will include the following, at minimum (refer to element, above, regarding protocols for notifying wildlife agencies) (See Example of Daily Monitoring Report in Attachment 1):
  - Date

- Start time.
- End time.
- Monitor name.
- Location Description
- Groups/Personnel
- Weather conditions
- Air Temperature (low/high)
- Precipitation
- Field Investigation Activity
- Daily Observation Summary
  - If special status species are encountered, include identification, by whom, time and condition
- Communication Summary
  - Shall include actions taken if special status species are encountered
- Site Photos containing locational data, altitude, and direction of view.

## 7.0 Demonstrated Compliance for past Geotech Activities

Based on clearance survey results, 2024 preconstruction field investigations will be relocated, where necessary, to avoid potentially significant impacts on special status natural communities, special status plants, cultural resources, and Tribal resources. Prior field investigation (soil investigations) completed by DWR in 2022 and 2023 included this same commitment and were successfully completed or, where necessary, abandoned to avoid potentially significant impacts on these resources. This Plan incorporates measures implemented for DWR's prior field investigations in 2022 and 2023 (See Table 1 and Table 3). Compliance with these additional measures will further reduce the less than significant biological resource impacts identified and analyzed in the DCP FEIR.

# Exhibit 5



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April 8, 2024

***Via E-Mail Only***

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[elizabeth.sarine@doj.ca.gov](mailto:elizabeth.sarine@doj.ca.gov)

Re: *Delta Conveyance Project Litigation* –  
Meet and Confer re: Motion to Enjoin Geotechnical Investigations  
(Case Nos. 24WM000009, 24WM000012, 24WM000014)

Dear Ms. Sarine:

Thank you for coordinating the April 3, 2024, meeting between the various petitioners' counsel in the related cases pertaining to the Delta Conveyance Project (Project) litigation and the Department of Water Resources (DWR) regarding the geotechnical investigations that DWR intends to undertake starting on May 1, 2024. As DWR explained and asserted during that meeting, the geotechnical investigations are covered by the 2023 Delta Conveyance Project Final Environmental Impact Report (DCP FEIR). Petitioners County of Sacramento and Sacramento County Water Agency (Case No. 24WM000014), City of Stockton (Case No. 24WM000009), and Sacramento Area Sewer District (Case No. 24WM000012) (collectively "clients") write to follow-up regarding Kelley Taber's question during the meeting as to why DWR believes it may initiate implementation of the geotechnical investigations when DWR has not yet filed a certification of consistency with the Delta Plan for the Project, as required under Water Code section 85225 (Section 85225). As you will recall, DWR did not answer Ms. Taber's question during the meeting and the question has remained unanswered.

By way of this letter, our clients seek to meet and confer with DWR regarding their intent to file a motion to enjoin DWR from undertaking the geotechnical investigations in violation of Section 85225. The basis for the motion is that the geotechnical investigations form part of the Project certified in the DCP FEIR, the Project is a "covered action" within the meaning of California Code of Regulations, title 23, section 5001(j), and Section 85225 expressly provides that, prior to initiating the implementation of a covered action, DWR "shall prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and shall submit that certification to the"

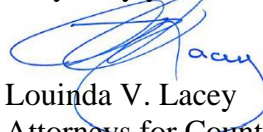
Delta Stewardship Council. As DWR is aware, it has not yet filed a written certification of consistency for the Project with the Delta Stewardship Council.

Unfortunately, given the pertinent dates at issue, our clients' motion cannot be heard via regular notice procedures before May 1, 2024. Our clients thus have three options in how to proceed with the motion:

1. If DWR agrees to have the motion heard on shortened time, the motion could be heard by Judge Acquisto on April 26, 2024.
2. If DWR agrees to postpone its geotechnical investigations until after a hearing via regular notice procedures, the motion could be heard as soon as possible in May 2024.
3. If DWR disagrees with either of the foregoing, our clients will file a motion for shortened time or, in the alternative, an ex parte application for relief.

As time is of the essence, we would appreciate a response by close of business on April 10, 2024, as to both the substantive and procedural meet and confer topics posed in this correspondence. Of course, please do not hesitate to contact us with any questions.

Very truly yours,



Louinda V. Lacey  
Attorneys for County of Sacramento,  
Sacramento County Water Agency, City of  
Stockton, and Sacramento Area Sewer District

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DCP Litigation – Meet and Confer re: Geotechnical Investigations  
April 8, 2024  
Page 3

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# Exhibit 6



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April 15, 2024

***Via E-Mail Only***

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Re: *Delta Conveyance Project Litigation* – Motion to Enjoin Geotechnical Investigations

Dear Ms. Sarine:

This letter is sent on behalf of petitioners County of Sacramento and Sacramento County Water Agency (Case No. 24WM000014), City of Stockton (Case No. 24WM000009), Sacramento Area Sewer District (Case No. 24WM000012), San Francisco Baykeeper et al. (Case No. 24WM000017), County of Butte (Case No. 24WM000011), South Delta Water Agency et al. (Case No. 24WM000062), and County of San Joaquin et al. (Case No. 24WM000010).<sup>1</sup>

On April 8, 2024, petitioners County of Sacramento and Sacramento County Water Agency, City of Stockton, and Sacramento Area Sewer District (collectively “SSD clients”) sent a letter to DWR regarding the SSD clients’ intent to file a motion to enjoin DWR from undertaking geotechnical investigations under the auspice of DWR’s approval of the Delta Conveyance Project and the related certification of the Final Environmental Impact Report, in violation of Water Code section 85225. Thank you for convening a meeting between DWR and counsel for the SSD clients and other petitioners in the related cases on that issue on April 12, 2024, at 11:30 a.m. to meet and confer on the motion. Although we appreciate the effort in setting up the meeting, we were disappointed that DWR’s focus during the meeting was to interrogate the petitioners on the grounds for the injunctive motion. In return, DWR was not forthcoming as to the grounds for its opposition, which did not facilitate a meaningful meet and confer on the subject. DWR’s response that the parties “will see” its declarations and

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<sup>1</sup> Given the arbitrary time constraint imposed by the Department of Water Resources (DWR) on April 12, 2024, at 5:45 p.m., demanding a response by close of business on April 15, 2024, other parties may later join in this letter.

opposition in response to the motion when the documents are filed did not advance the discussion.

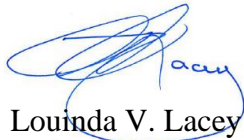
At 2:29 p.m. following the meeting on April 12, 2024, and as discussed and requested during that meeting based on DWR’s representations regarding the scope of the planned geotechnical investigations, Dante Nomellini, Jr. (counsel for South Delta Water Agency et al. and Central Delta Water Agency) sent an email asking DWR to provide additional information as to the geotechnical investigations DWR plans to conduct during May 2024. We are still awaiting a response to that request.

At 5:45 p.m. on April 12, 2024, we received your email requesting a response “by COB on Monday 4/15 at the latest” as to DWR’s new position that it would stipulate to a hearing on shortened time on April 26, 2024, in exchange for DWR being able to file its opposition brief “no less than 5 court days after receipt of Petitioners’ motion papers.” In the absence of having the information requested by Mr. Nomellini, Jr. and because our clients are public agencies with whom we must confer and who are not available at a moment’s notice for a conference, we must decline DWR’s stipulation proposal. We can confirm at present that we do not intend to seek an ex parte hearing on April 26, 2024.

We hope to receive DWR’s response to Mr. Nomellini, Jr.’s request soon.

Very truly yours,

Somach Simmons & Dunn



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Attorneys for County of Sacramento,  
Sacramento County Water Agency, City of  
Stockton, and Sacramento Area Sewer District

**Soluri Meserve**

/s/

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County of Solano, County of Yolo and Central  
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**Nomellini, Grilli & McDaniel Law Office**

/s/

Dante John Nomellini, Jr.

Attorneys for South Delta Water Agency et al.

**Law Office of Roger B. Moore**

/s/

Roger B. Moore

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# Exhibit 7



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April 22, 2024

**Via Email Only**

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*ADDITIONAL COUNSEL LISTED BELOW*

RE: *Delta Conveyance Project Litigation* – Response to Petitioners’ Letters and  
Need for Petitioners’ Liaison Counsel

Sacramento Superior Court, Case Nos. **24WM000006,**  
**24WM000008, 24WM000009, 24WM000010, 24WM000011,**  
**24WM000012, 24WM000014, 24WM000017, 24WM000062**

Dear Counsel:

This letter is sent on behalf of the Department of Water Resources (DWR) and responds to the April 8, 2024 letter (April 8 Letter) and April 15, 2024 letter (April 15 Letter) sent by Ms. Lacey on behalf of most of the Petitioners in the above-referenced cases challenging the Delta Conveyance Project Environmental Impact Report (DCP EIR) and related project approval. Even though Sierra Club Petitioners and Tulare Lake Basin Water Storage District (Tulare Lake) did not sign the April 8 Letter or April 15 Letter, we wanted to send this communication to Petitioners’ counsel in all nine of the related cases because we would like to explore with all parties the potential appointment by the Court of a Petitioners’ liaison counsel or group representative(s) for Petitioners.

As explained below, DWR strongly disputes the mischaracterizations in the April 15 Letter. We provide below a summary of the communications between DWR and various Petitioners’ counsel regarding potential motions to enjoin the geotechnical investigations starting in February 2024. We acknowledge that Petitioners may have different views of these events, and we are not attempting to impose our viewpoint on others. Rather, we offer this summary to

explain why DWR has concluded that there is a need for the Court to appoint a Petitioners' liaison counsel, and we intend to raise this issue at the Case Management Conference on May 31, 2024 (May 31 CMC). This letter serves to invite counsel for Petitioners to enter into a dialogue with us about how the parties may be able to have clearer and more efficient communication moving forward in this litigation.

On February 20, 2024, counsel for DWR emailed counsel for County of San Joaquin Petitioners to schedule a meet-and-confer regarding a potential preliminary injunction motion that Ms. Meserve had raised during the February 16th Case Management Conference. On March 5, 2024, counsel for DWR, County of San Joaquin Petitioners, County of Butte, and Sierra Club Petitioners met to discuss petitioners' concerns regarding geotechnical investigations. At this meeting, counsel for DWR disclosed that geotechnical activities (including drilling) would begin as early as May 1, 2024. The parties at this meeting agreed to negotiate a Notice Agreement, similar to a previous agreement shared by Ms. Meserve related to DWR's geotechnical investigations that had been proceeding under a different environmental document and approval. At this meeting, the parties agreed to meet again on March 25, 2024, to continue negotiations over the Notice Agreement, with the understanding that such an agreement would provide DWR with more certainty regarding briefing deadlines in exchange for providing Petitioners with advanced notice of the May 2024 and subsequent planned geotechnical investigations.

Between March 5 and March 25, DWR was informed that other petitioners—including those who had not raised the possibility of filing a potential preliminary injunction motion during the CMC—were interested in joining negotiations over the Notice Agreement proposed by Ms. Meserve. Between March 12 and March 15, counsel for DWR shared with all Petitioners a draft Notice Agreement that committed DWR to providing a 30-day notice (accompanied by maps indicating the approximate locations) in exchange for Petitioners' agreement to set "any hearing for a temporary or preliminary injunction" so that DWR would be provided with not less than 16 days to draft its opposition to such motions. Based on the level of interest among multiple Petitioners, on March 15, 2024, litigation counsel for DWR emailed counsel for all Petitioners who had expressed an interest in signing the Notice Agreement to see how many would be interested in participating in a meeting with DWR staff counsel Ken Bogdan and Chris Butcher to discuss the geotechnical investigations covered by the DCP EIR. On March 19, an invitation for this April 3 meeting was sent to counsel for County of San Joaquin Petitioners, County of Butte, South Delta Water Agency Petitioners, County of Sacramento Petitioners, City of Stockton, Sacramento Area Sewer District, and Sierra Club.

Late on Friday, March 22, Ms. Meserve's office canceled without explanation the previously scheduled March 25 meeting that was intended to continue negotiations over the Notice Agreement. On March 22, I emailed Ms. Meserve to inquire as to the reason for this cancellation, expressing that counsel for DWR was still interested in having this meeting so that the parties could continue negotiations over the Notice Agreement because DWR would be unable to provide 30-day notice of the May 2024 work unless the Notice Agreement was signed before April. In response, Ms. Meserve shared that Petitioners had met on March 22 and were "working on a joint response on the notice issue." When I called Ms. Meserve on March 25

seeking additional clarifications, I learned that all Petitioners were now interested in negotiating the Notice Agreement and that it would take more time for the parties to reach agreement.

On March 26, 2024, DWR shared with counsel for all Petitioners a revised version of the Notice Agreement to inform Petitioners that in order to satisfy the timing requirements, the terms initially offered would need to be amended unless the parties were able to reach agreement before Friday, March 29, 2024. The next day, on March 27, DWR received a letter sent by counsel for County of Sacramento Petitioners, City of Stockton, County of San Joaquin Petitioners, San Francisco Baykeeper Petitioners, Sierra Club Petitioners, Tulare Lake, and South Delta Water Agency Petitioners. This March 27 Letter informed DWR that Petitioners would not be signing the Notice Agreement before the April 3 meeting but that Petitioners would be sending a separate document with their comments and edits to the Notice Agreement. In response to some of the substantive concerns expressed in this letter, on March 29, 2024, counsel for DWR informed Petitioners who had signed this letter that the May geotechnical activities would be “conducted based on voluntary agreements with landowners” and that the terms of these Temporary Entry Permits (TEPs) are similar to the terms of the prior court-ordered entry order in the JCCP 4594 coordinated action referenced in Petitioners’ March 27 Letter and previously raised by Mr. Keeling.

On March 29, Ms. Meserve sent DWR the Petitioners’ edits to the Notice Agreement. In this version, Petitioners added two new substantive terms that had not been previously discussed with DWR and that were not acceptable to DWR. On April 3, DWR met with counsel for all Petitioners. Shortly before this meeting, DWR litigation counsel provided Petitioners with the “**2024 Preconstruction Field Investigation Environmental Compliance Monitoring Plan**” (EC-14 Plan), which sets forth the various protective measures and conditions DWR has committed to performing prior to and during geotechnical investigations. During the meeting, DWR staff counsel answered Petitioners’ questions regarding the work to be conducted in May 2024 and the conditions in the EC-14 Plan. With regard to the Notice Agreement, when DWR informed Petitioners that it could not agree to the two new substantive terms, counsel for some Petitioners indicated their willingness to continue negotiations over the Notice Agreement. These Petitioners expressed a willingness to delete the two new terms if DWR would consider providing advanced notice of more than 30 days.

On Friday, April 5, DWR sent counsel for all Petitioners (a) revisions to the Notice Agreement that committed DWR to providing **45-day advanced notice**, (b) a **map of the 13 holes** currently planned for May 2024, and (c) the **Tribal Cultural Resources Management Plan**. At this time, none of the counsel for Petitioners who attended the April 3 meeting had informed DWR that they were no longer interested in negotiating the Notice Agreement.

In the April 8 Letter, DWR learned for the first time that County of Sacramento Petitioners, City of Stockton, and Sacramento Area Sewer District had abandoned the negotiations over the Notice Agreement. In this letter, Ms. Lacey stated that her clients “seek to meet and confer with DWR regarding their intent to file a motion to enjoin DWR from undertaking the geotechnical investigations in violation of [Water Code] Section 85225.” The April 8 Letter presented DWR with three options:

1. If DWR agrees to have the motion heard on shortened time, the motion could be heard by Judge Acquisto on April 26, 2024.
2. If DWR agrees to postpone its geotechnical investigations until after a hearing via regular notice procedures, the motion could be heard as soon as possible in May 2024.
3. If DWR disagrees with either of the foregoing, our clients will file a motion for shortened time or, in the alternative, an ex parte application for relief.

(April 8 Letter, p. 2.) On April 10, counsel for DWR provided their availability for a meeting on either April 11 or April 12. Ms. Lacey responded that they were available to meet on Friday, April 12.

Counsel for all parties except for Sierra Club Petitioners and Tulare Lake attended the April 12 meeting. That same day, counsel for DWR emailed all Petitioners to express that DWR was willing to accept Option 1 in the April 8 Letter and would stipulate to have Petitioners' preliminary injunction motion(s) heard on April 26, 2024—provided that the stipulation allowed for DWR's opposition brief to be due no less than 5 court days after receipt of Petitioners' motion papers. Due to the projected deadlines associated with having the motion(s) heard on shortened time, DWR asked for a response by Monday, April 15.

In the April 15 Letter, DWR learned for the first time that counsel for County of Sacramento Petitioners, City of Stockton, and Sacramento Area Sewer District had—without any explanation—decided to withdraw and reject the Option 1 they presented to DWR in the April 8 Letter. Then, on April 18, Ms. Lacey emailed counsel for DWR to propose a May 31, 2024, hearing date for the preliminary injunction motions that County of Sacramento et al., City of Stockton, and Sacramento Area Sewer District intended to file. When I called Ms. Lacey to ask if the other Petitioners had also agreed to a May 31 hearing, she informed me that she had contacted counsel for the other Petitioners. Although she had some preliminary communications with at least two counsel for other Petitioners, she was not able to ascertain at that time what all the other Petitioners thought about the May 31 hearing proposal. As of the date of this letter, it appears that the Court has calendared a motion for preliminary injunction on May 31 in all nine related cases, but it is not clear to DWR if Petitioners in all nine cases intend to file preliminary injunction motions before the May 31 hearing.

While DWR is frustrated by the inconsistency of Petitioners' negotiating positions described above, DWR is willing to attribute what has occurred to the understandable difficulties of coordinating with nine separate Petitioners' groups. We continue to believe that clear communication and good-faith efforts to reach agreement on procedural matters will ensure that this litigation proceeds as efficiently as possible for all parties and for the Court. To that end, we intend to ask the Court to appoint one or two Petitioners' liaison counsel or group representative(s) at the May 31 CMC. But we invite any and all counsel for Petitioners to share with us other ideas for how the parties may be able to accomplish the same goals of clear and efficient communication going forward.

Sincerely,

**L. Elizabeth  
Sarine** Digitally signed by L.  
Elizabeth Sarine  
Date: 2024.04.22  
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L. ELIZABETH SARINE  
Deputy Attorney General

For **ROB BONTA**  
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